FILED
MAR 4 1946
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 908

MARIO MERCADO RIERA, EXECUTOR, ET AL., *Petitioners*,

v.

MARIA LUISA MERCADO RIERA DE BELAVAL, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT, AND SUPPORTING BRIEF.

TERO W. LLEWELYN,
PEDRO M. PORRATA,
Attorneys for Petitioners.

LEON, WEIL & MAHONY,
Of Counsel.

Federal Printing & Binding Co., Washington, D. C.

SUBJECT INDEX.

Page

Chronology ..... v-xii

Petition 1-10

Summary and Short Statement 2-4

Jurisdiction of this Court 4

Questions Presented 5-6

Reasons for Allowance of the Writ 6-9

Conclusion 10

Brief 11-76

Opinions below 11-12

Jurisdiction 12

Statement of the Case 12-20

Specification of Errors 20

Summary of Argument 20-22

Argument 22-76

Point I: Under the Federal Organic Act for Puerto Rico the insular Supreme Court was without jurisdiction on certiorari to review the District Court orders in question 22-33

Point II: Under the same act, even if the insular Supreme Court had jurisdiction to review the District Court orders in question, it had no lawful power on certiorari to do more than vacate them, and its substitution of its own order directing delivery of the estate to the heirs was in excess of its jurisdiction 33-39

Point III: The judgment of the insular Supreme Court in case number 1517, and the corresponding affirmatory judgment of the Court of Appeals, deprive Petitioner Porrata of property without due process, in violation of the Fifth Amendment and the Organic Act of Puerto Rico 39-61

Page

Supplemental Statement of Facts 39-50

Question Presented by Porrata 50

Position of Porrata 51

Opinion of Court of Appeals regarding Porrata 51-57

Applicable Decisions of this Court.....57-61

Conclusion as to Point III 61

Point IV: Even as a matter of purely local law, the insular Supreme Court judgments in this case are patently and inescapably erroneous, and the affirmatory judgment of the Court of Appeals involves an erroneous extension of the rule of deference..62-76

Conclusion 76

Appendices:

A. Extracts from the Code of Civil Procedure of Puerto Rico 77-87

B. Extracts from the Civil Code of Puerto Rico....88-95

TABLE OF CASES.

Arpin v. Del Toro, District Judge, 8 P. R. R. 276..... 24
Arribas v. District Court, 9 P. R. R. 436 25
Barrera v. District Court, 10 P. R. R. 181 25
Binderup v. Pathé Exchange, 263 U. S. 291..... 35
Boston Tow Boat Co. v. United States, 321 U. S. 632 ..54, 55
Coe v. Armour Fertilizer Works, 237 U. S. 413 57
Cornell Steamboat Co. v. United States, 53 F. Supp. 349 56
Crehore v. Registrar, 22 P. R. R. 30..... 63
De Castro v. Board of Com'rs, 322 U. S. 451 .....9, 76
Delgado v. District Court, 8 P. R. R. 484 24
Ex parte Suan, 27 P. R. R. 890 63
Fernandez v. District Court, 6 P. R. R. 202 24
Gonzalez v. De la Guerra, 46 P. R. R. 256 .....67, 68
Heirs of Pelliccia v. District Court, 36 P. R. R. 588 63
Hernandez v. District Court, 17 P. R. R. 498..... 25
Howe Tel. & Tel. Co. v. Los Angeles, 227 U. S. 278.... 61
National Surety Co. v. Rossy, 19 P. R. R. 897.....25, 33-34

Page

Pedroza v. District Court, 58 P. R. R. 769..... 29
People v. Municipal Court, 46 P. R. R. 610.....29, 30
Perez v. Succrs. of M. Perez & Co., 41 P. R. R. 844.... 63
Perez v. Zeda, 35 P. R. R. 303..... 63
Porrata v. District Court, 53 P. R. R. 140.....40, 47, 69
Rees v. Watertown, 19 Wall. 107..... 59
Saunders v. Shaw, 244 U. S. 317..... 59
Smallwood v. District Court, 53 P. R. R. 707..... 30
Subirana v. Padilla, District Judge, 12 P. R. R. 72.... 24

STATUTES.

Federal.

Constitution, 5th Amendment.....5, 21
Organic Act for Puerto Rico, March 2, 1917

Sec. 40 (39 Stat. 965)....5, 20, 22, 26, 28, 31, 32, 33, 34, 37
Sec. 2 (39 Stat. 951).....5, 21, 51, 61

Organic Act for Puerto Rico, April 12, 1900 (31 Stat. 77)

Sec. 33 22-23

Judicial Code

Sec. 128 (28 U. S. C. 225)..... 54
240(a) (28 U. S. C. 347)..... 4

Act of February 13, 1925, Sec. 8a (43 Stat. 940; 28 U. S. C. 350)..... 4

Puerto Rican.

Civil Code, 1930 Ed. (App. B, *infra* pp. 88-95):

Secs. 814-833 .....13, 64, 65
824-825 .....13, 63, 66
827 .....64, 90
828 72-73
833 49
964-988 .....17, 40, 67
980-981 .....17, 62

Page

Code of Civil Procedure, 1933 Ed. (App. A, *infra* pp. 77-87):

Secs. 295 25
463 (3) 71
534-619 (Act of Mar. 9, 1905, relating to special legal proceedings) 13
558 62
567-570 ..... 13, 14, 66, 68
571 13
587-592 ..... 14, 65, 73
597 64
603 68
670-674 (Act of March 10, 1904, authorizing certiorari) 23, 27, 28, 37, 50

OTHER AUTHORITIES.

Rule 38, U. S. Supreme Court, par. 5(b) 28
Rule 69, Supreme Court of Puerto Rico 46
Ruling Case Law, Vol. 5, p. 251 30
Jurisprudencia Civil (Spanish), Vol. 96, pp. 599-602 .. 48
Manresa (Spanish), Vol. 6, p. 749 63

CHRONOLOGY.

	Date	Case No.	Incident
1.	Aug. 22, 1937	....	Don Mario Mercado Montalvo, widower, died at Guayanilla, Puerto Rico, leaving as his sole direct heirs, his four adult children, namely, Don Mario Mercado Riera, Doña Margarita Mercado Riera de Mandry, Doña Maria Luisa Mercado Riera de Belaval, and Don Adrian Mercado Riera (R. 498-503).

District Court of Ponce.

2.	Aug. 28, 1937	764	Holographic will presented for probate (R. 498-503).
3.	Aug. 30, 1937	764	Will opened, read in open court before the heirs present, and admitted to probate (R. 508-523).
4.	Aug. 31, 1937	....	Don Mario Mercado Riera formally accepted executorship and took oath of office (R. 193-195).
5.	Sept. 1, 1937	782	Petition filed by Don Mario Mercado Riera for letters testamentary, and letters issued (R. 191-197).
6.	Sept. 8, 1937	802	Pedro M. Porrata granted judicial credentials as "Auditor-Partitioner" of the estate (R. 793-794).
7.	Sept. 10, 1937	782	Executor granted 90 days extension of time to make inventory (R. 199).
8.	Dec. 6, 1937	782	Executor granted further extension of time to March 10, 1938, to file inventory (R. 201-202).
9.	Dec. 7, 1937	782	Executor filed first quarterly account, under Sec. 587, Code of C. P. (Sec. 54, Act of 1905 Relating to Special Legal Proceedings) (R. 205).
10.	Dec. 15, 1937	782	Executor filed motion to fix term within which to file objections to quarterly account (R. 205-206).
11.	Dec. 15, 1937	782	Doña Margarita appeared personally, joining with her brother, Don Mario, in signing and filing a personal undertaking to make restitution of certain items of expenditure shown on the executor's quarterly accounts, should the items be disallowed (R. 207-208).

	Date	Case No.	Incident
12.	Dec. 20, 1937	782	Court denied motion (No. 10 above), citing Secs. 587, 588, 589 and 590, Code of C. P. (Secs. 54, 55, 56 and 57, Special Proceedings Act) (R. 208).
13.	Jan. 24, 1938	1213	Don Adrian Mercado Riera appeared personally and by his attorneys, Jose A. Poventud and Alberto S. Poventud, by petition praying that he be adjudged to be an acceptor "with benefit of inventory", and that executor be required to make a judicial inventory (R. 774-781).
14.	Jan. 24, 1938	1213	Court granted petition of Don Adrian (No. 13 above) (R. 782-785).
15.	Jan. 26, 1938	1213	Pedro M. Porrata, testimentary auditor-partitioner, was granted leave to intervene as a party in interest (R. 796).
16.	Feb. 10, 1938	1213	Pedro M. Porrata filed motion praying that the order of Jan. 24, 1938, requiring the executor to make inventory, be rescinded, and that the testimentary partitioner be ordered to make the required inventory (R. 797-800).
17.	Feb. 11, 1938	782	Doña Maria Luisa Mercado Riera de Belaval appeared by her attorneys, Celestino Iriarte, F. Fernandez Cuyar, and H. Gonzalez Blanes, by filing motion that court deny further extensions of time to executor to file inventory (R. 209-210).
18.	Feb. 18, 1938	1213	Don Mario, as executor, appeared by his attorneys, moving that the various pending motions be set for hearing (R. 802-806).
19.	Feb. 21, 1938	782	Pedro M. Porrata, as testamentary partitioner, filed motion for leave to intervene (R. 211-212).
20.	Mar. 2, 1938	1213	Court denied Mr. Porrata's motion (No. 16 above), reserving his powers and rights as testamentary partitioner (R. 811-812).
21.	Mar. 9, 1938	782	Court denied Mr. Porrata's motion (No. 19 above) for leave to intervene (R. 218-219).

Supreme Court of Puerto Rico.

	Date	Case No.	Incident
22.	Mar. 8, 1938	1134	Court issued writ of certiorari, on the petition of Mr. Porrata, to review the district court order of Mar. 2, 1938 (No. 20 above), denying Porrata's motion of Feb. 10, 1938 (No. 16 above) (R. 863).
23.	Apr. 29, 1938	1134	Court annulled writ (No. 22, above) and remanded case to district court for further proceedings, and for fixing a new term for compliance by executor with district court order of Jan. 24, 1938 (No. 14 above) (R. 856-863). See also *Porrata* v. *District Court*, 53 P. R. R. 140.

District Court of Ponce.

24.	May 11, 1938	1213	Mandate from insular supreme court on its judgment (No. 23 above) received (R. 855).
25.	Aug. 19, 1938	802	Partitioner's time to make partition extended to Sept. 6, 1939 (R. 570-571).
26.	Sept. 9, 1938	....	Contract of Compromise, with inventory of estate, agreed upon, signed, and notarized by the heirs, their respective wives and husbands and Mr. Porrata; providing, *inter alia*, in paragraphs (l) and (m) (R. 544-545), for latter's preparation of his report as partitioner within ten days from payment of the inheritance tax on the estate, and for execution of the report or deed of partition by him and by all of the four heirs (Exhibit 6, R. 524-558).
27.	Sept. 12, 1938	1213	Executor filed inventory (same as that attached to contract No. 26 above), same was approved, and the "acceptance-of-inheritance" proceedings terminated, by order of the court (R. 891-892).
28.	Mar. 6, 1940	....	Executor submitted to heirs for their approval, final accounts as of March 4, 1940; the items clearly showing that he had continued always up to that time to exercise the functions of a general administrator, collecting rents and debts due the estate, paying legacies and other obligations of the estate, compromising tax claims of the Insular, Federal and New York State governments, and generally managing the properties and affairs of the estate (R. 234-242).

	Date	Case No.	Incident
29.	Mar. 9, 1940	....	Treasurer of Puerto Rico delivered to executor receipt for $155,878.50, insular inheritance taxes and interest (R. 583-584).
30.	Mar. 14, 1940	....	Mr. Porrata transmitted copies of his proposed report or deed of partition to the heirs for examination in preparation for a meeting to be held on March 16, 1940, to reconcile any differences (R. 597-602). The text of the report or deed appears in the record on pages 607 to 770.
31.	Mar. 16, 1940	....	Don Adrian and Doña Maria Luisa wrote Mr. Porrata, declining to attend conference and stating numerous objections to the draft of report or deed of partition (R. 598-602).
32.	Mar. 16, 1940	782	Don Adrian and Doña Maria Luisa, in person, and by attorneys Jose A. Poventud and Celestino Iriarte, filed list of 16 objections to specific items of the executor's final account without, however, making any objection to his having continued to act as administrator of the estate (R. 225-233).
33.	June 7, 1940	782	Don Adrian and Doña Maria Luisa filed supplemental list of 6 specific objections to final accounts, again omitting any objection to executor's continuing to administer the estate (R. 242-244).
33a.	Aug. 27, 1940	782	Don Adrian and Doña Maria Luisa filed motion to set for hearing their objections to final account (R. 245-247).
34.	Nov. 12, 1940 to May 27, 1941	782	Hearings on objections to final accounts held before Judge Sepulveda on 31 days throughout this period, Don Adrian and Doña Maria Luisa being represented throughout by their respective attorneys, Jose A. Poventud and Celestino Iriarte (R. 287-348).
35.	Oct. 27, 1941	782	Don Adrian and Doña Maria Luisa, by their attorneys, Messrs. Iriarte and Poventud, filed a petition to direct the executor to deliver the properties to heirs immediately and render supplementary final accounts, but without any contention that the term of the executor had expired two years before (R. 348-359).
36.	Nov. 17, 1941	782	Executor filed answer to petition (No. 35 above) for immediate delivery of properties, praying court decide matters as soon as possible (R. 363-364).

	Date	Case No.	Incident
37.	Nov. 18, 1941	782	Attorneys Zapater and Ochoteco filed motion to fix their fees for services as attorneys for the executor from Aug. 31, 1937 to Oct. 27, 1941 (R. 366-375), with proof of personal service on Mr. Poventud, attorney for Doña Maria Luisa, and Mr. Iriarte, attorney for Don Adrian.
38.	Nov. 21, 1941	782	Don Mario, as executor, filed motion for orders directing clerk of court to remit to executor deposit of $5,176.10 belonging to estate, to authorize executor to cash check for $3,125 drawn to order of testator, and to authorize sale of certain personal property of estate, all in order to provide funds needed to pay legacies (R. 377-379).
39.	Nov. 26, 1941	782	Don Adrian and Doña Maria Luisa, appearing specially, through attorneys Poventud and Iriarte, filed a motion to quash service on them of motion (No. 37 above) to fix attorneys fees, alleging for the first time that the executorship of Don Mario had expired in September, 1939 (R. 380-381).
39*a*.	Nov. 26, 1941	782	Pedro M. Porrata filed (R. 474) his special "Report of the Testamentary Partitioner" (R. 385-395), with copy of his partition report or deed attached as an exhibit (R. 393), and prayed for hearing thereon.
39*b*.	Dec. 4, 1941	782	Doña Maria Luisa and Don Adrian filed special appearance and motion (R. 396-397) to quash service on them through their attorneys of Mr. Porrata's special report (No. 39*a* above).
40.	Feb. 19, 1942	782	Judge Sepulveda on basis of hearings mentioned in No. 34 above, filed opinion and final order modifying executor's final accounts, and approving same as modified (R. 397-430).
41.	Mar. 2, 1942	782	Executor filed notice of appeal to insular supreme court from Judge Sepulveda's order of Feb. 19, 1942 (No. 40 above) (R. 432).
42.	Mar. 2, 1942	782	Don Adrian and Doña Maria Luisa filed notice of appeal to insular Supreme Court from Judge Sepulveda's order of Feb. 19, 1942 (No. 40 above) (R. 437).
43.	June 3, 1942	782	Executor filed petition that court expedite decision on petition of heirs for immediate delivery of properties, and other pending motions (R. 445-448).

Chronology Continued.

	Date	Case No.	Incident
44.	July 29, 1942	782	Executor filed notice of his request that pending motions be included in motion calendar for Aug. 3, 1942 (R. 449-450).
45.	Aug. 10, 1942	782	Executor filed report or argument again praying that court decide the pending motions (R. 452-457).
46.	Dec. 7, 1942	782	Executor filed notice of request that all pending motions be included on calendar for Dec. 14, 1942 (R. 458-459).
47.	Dec. 14, 1942	782	Don Adrian and Doña Maria Luisa, appearing specially, filed motion through their attorneys Iriarte and Poventud to quash service on them of executor's motion *re* funds to pay legacies (No. 38 above) (R. 461-462).
48.	Dec. 14, 1942	782	The pending motions were argued before Judge Gadea Picó, and submitted (R. 462-464).
49.	Mar. 23, 1943	782	Judge Gadea Picó denied motion of Don Adrian and Doña Maria Luisa to quash service of motion to fix attorneys' fees (No. 39 above) (R. 465-466).
50.	Mar. 24, 1943	782	Judge Gadea Picó denied motion of Don Adrian and Doña Maria Luisa (No. 35 above) for delivery of properties; reserving judgment on Porrata's special report (No. 39*a* above) and the objecting heirs' motion to quash service thereof (No. 39*b* above), pending hearing thereon (R. 467-476).
51.	Mar. 24, 1943	782	Judge Gadea Picó denied motion of Don Adrian and Doña Maria Luisa (No. 47 above) to quash service of executor's motion (No. 38 above) *re* funds to pay legacies (R. 476-478).
52.	Apr. 2, 1943	782	Don Adrian and Doña Maria Luisa filed notice of appeal to insular Supreme Court from Judge Gadea Picó's order (No. 50 above) denying motion for immediate delivery of properties (R. 491).

Supreme Court of Puerto Rico.

53.	Apr. 1, 1943	1516	Don Adrian and Doña Maria Luisa filed petition for certiorari to review Judge Gadea Picó's order (No. 49 above) denying motion to quash service of motion to fix attorneys' fees (R. 1-12); and

	Date	Case No.	Incident
		1517	Petition for certiorari to review Judge Gadea Picó's order (No. 50 above) denying motion for immediate delivery of properties to heirs (R. 40-58); and
		1518	Petition for certiorari to review Judge Gadea Picó's order (No. 51 above) denying motion to quash service of executor's motion re funds to pay legacies (R. 165-176).
54.	Apr. 2, 1943	1516 1517 1518	Court ordered issuance of writs (R. 12, 59, 176).
55.	Apr. 3, 1943	1516 1517 1518	Writs issued (R. 13, 60, 177).
56.	May 24, 1943	1516 1517 1518	Don Mario, as executor, intervened by motions to quash the writs (R. 17, 65, 179-180).
57.	May 24, 1943	1517	Pedro M. Porrata, testamentary partitioner, intervened by filing a special appearance with a copy of special report previously rendered by him to the district court in Case No. 782, showing why the partitioning of the estate had not been completed; and also filed a detailed answer to the petition for certiorari, praying that the writ be quashed (R. 67-96).
58.	May 24, 1943	1516 1517 1518	Cases argued and submitted by attorneys representing the petitioners, the executors and the partitioner (R. 23, 96, 181).
59.	July 14, 1943	1516 1517 1518	Court rendered opinion and judgments, reversing district court in each case, vacating the three orders under review, and in 1517 substituting an order directing the executor to proceed immediately to deliver the properties to the heirs and to render supplementary account (R. 24, 97-121, 181-182).
60.	July 28, 1943	1516 1517 1518	Don Mario filed notice of appeal to U. S. Circuit Court of Appeals in each case (R. 24, 123, 182).
61.	July 28, 1943	1517	Pedro M. Porrata filed notice of appeal to U. S. Circuit Court of Appeals in this case (R. 126).
62.	July 31, 1943	1516 1517 1518	Insular supreme court rendered supplemental opinion modifying opinion (No. 59 above), on motion of Judge Gadea Picó, as to time taken by latter to decide motions (R. 31-33).

	Date	Case No.	Incident
63.	Aug. 7, 1943	....	Don Mario relinquished the executorship, custody and administration of the estate to the heirs, stating expressly, however, that he took this action "without prejudice to the appeal filed by the executorship from the judgment of the Supreme Court of Puerto Rico of the 14th of July, 1943, in cases numbers 1516, 1517 and 1518" * * * "and in order not to take any action whatsoever concerning the properties during the appeal, and, of course, only under the compulsion of said judgment" (R. 155, 156-157).

Supreme Court of the United States

OCTOBER TERM, 1945.

No. .....

MARIO MERCADO RIERA, EXECUTOR, ET AL., *Petitioners,*

v.

MARIA LUISA MERCADO RIERA DE BELAVAL, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

To the Honorable The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners Mario Mercado Riera, Testamentary Executor, and Pedro M. Porrata, Testamentary Partitioner, of the estate of Mario Mercado Montalvo, Deceased, pray issuance by this court of a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the First Circuit, entered in this cause (comprising four separate appeals consolidated for hearing in that court) on November 23, 1945, affirming judgments of the Supreme Court of Puerto Rico rendered July 14, 1943, upon certiorari to the District Court of Ponce, vacating certain inter-

locutory orders of the latter court in a testamentary proceeding there called Civil Action No. 782, and in effect summarily terminating that proceeding by an order requiring the executor to proceed immediately to deliver the assets of the estate and render final accounts to the heirs, without completing payments of legacies, debts or expenses of administration; without first accomplishing or permitting partition of the residuary estate as required both by the will and a formal written contract between the heirs, the executor and the partitioner; without judicial sanction or approval of the settlement and distribution of the estate; and without judicial discharge of the executor.

SUMMARY AND SHORT STATEMENT OF THE MATTERS INVOLVED.*

The contentions of the respondents, who comprise two of the four heirs, and the grounds upon which the insular supreme court based the judgments affirmed by the court next below, are briefly, in substance, that:

(1) The proceedings in the district court never amounted to a judicial administration of the estate;

(2) For that reason the executor's term of office and powers as such were governed exclusively by the old Spanish Civil Law provisions of the Puerto Rican Civil Code, under which a testamentary executor has only two years at most to discharge his functions, unless expressly given a specific longer time by the will or by unanimous consent of the heirs and legatees;

(3) Accordingly, as the testator in this case had prescribed in his will only that the executor's statutory term was extended "to all the time that may be necessary for the execution" of the trust, without more definitely specifying the length of the extension, there having been no ex-

* A more comprehensive statement is in the Supporting Brief (*infra*, pp. 12-20).

press written consent of the heirs and legatees to any extension, and the executor having qualified as such on September 1, 1937, his term had automatically expired two years later on September 2, 1939;

(4) For similar reasons the term of office of the testamentary partitioner had likewise expired with that of the executor;

(5) Thereupon the custody of the properties of the estate and any then uncompleted duties of both the executor and the partitioner had legally devolved automatically upon the heirs jointly; and

(6) The district court had exceeded its lawful jurisdiction in continuing after that time to treat the estate as under judicial administration, and was without jurisdiction to make the interlocutory orders in question.

On the other hand, the petitioners contend, in substance, briefly, that:

(1) The insular supreme court was without legal power to grant certiorari to review the interlocutory orders in question, or to vacate them; this by reason of the limitations imposed upon the jurisdiction of that court by section 40 of the federal Organic Act for Puerto Rico;

(2) Under the same federal statute, the insular supreme court was even more clearly without jurisdiction to substitute, for one of the vacated interlocutory orders, its own order directing the executor immediately to deliver the estate to the heirs jointly;

(3) The substituted order violates fundamental federal constitutional and statutory rights of Pedro M. Porrata, personally and as the testamentary partitioner, under the due-process and equal-protection clauses of the Constitution and the Organic Act, by passing upon and adversely adjudicating his status, rights and duties under the will and

a written contract, in a proceeding in which he had been accorded no hearing in the district court;

(4) As a matter of purely local law, the executorship, partitionership and administration of this estate, were under the supervision of the district court from the beginning, or soon became so, and continued always thereafter to be so, by operation of law as well as the tacit consent and the acts of all concerned, including particularly these respondents, and the judgments of the insular supreme court are clearly, patently and inescapably erroneous for that reason as well as the others hereinabove indicated; and

(5) For like reasons, the United States Circuit Court of Appeals erred in affirming the judgments of the insular supreme court.

JURISDICTION OF THIS COURT.

This being a civil cause in a circuit court of appeals, it falls squarely within the plain terms of section 240(a) of the Judicial Code, as amended by section 1 of the Act of February 13, 1925 (43 Stat. 938), conferring jurisdiction upon the Supreme Court of the United States to require by certiorari that any such cause be certified to the Supreme Court for determination. As above stated, the judgment of the Circuit Court of Appeals, review of which is hereby sought by these petitioners, was entered November 23, 1945 (R. 932-933).

A petition for rehearing, duly interposed by these petitioners in that court, was denied January 3, 1946 (R. 933), and the three months period allowed by section 8a of the act last above mentioned, for filing this petition, expires April 3, 1946.

THE QUESTIONS PRESENTED.

Federal.

1. Did the insular supreme court have jurisdiction on certiorari to review any of the district court orders which it undertook to review and vacate in these cases, considering the limitations imposed upon the jurisdiction of that court by section 40 of the federal Organic Act for Puerto Rico, approved March 2, 1917 (39 Stat. 965)? See Supporting Brief, Point I (infra, pp. 22-23).

2. If so, did that court have jurisdiction on certiorari not only to vacate the district court orders in question, but to go further and substitute for one of those orders the other and different affirmative order in question, in view of the same federal statutory limitations? See Supporting Brief, Point II (infra, pp. 33-39).

3. With regard to the Petitioner Porrata, personally and as testamentary partitioner, does not the judgment of the insular supreme court in Case No. 1517, considered in connection with the findings and conclusions set forth in its supporting opinion, violate the due process and equal protection clauses of the Fifth Amendment to the Constitution and the Organic Act for Puerto Rico, approved March 2, 1917, by adjudging Porrata guilty of neglect to perform his official duties as testamentary partitioner and by declaring his office as such terminated, in a proceeding in which he had not been accorded notice or hearing in the district court? See Supporting Brief, Point III (infra, pp. 39-61).

Local.

4. As a matter of purely local law, did not the insular supreme court err patently and inescapably in its holdings that there was no judicial administration of the estate, that the executorship and partitionership automatically expired in 1939, and that the district court had no jurisdiction to make the interlocutory orders in question, as well as in each

of the three judgments based on those holdings, review of the affirmance of which by the Circuit Court of Appeals is hereby sought? See Supporting Brief, Point IV (infra, pp. 62-76).

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

Each of the three manifestly important federal questions presented here is one which petitioners believe has not been and should be settled by this court. In its affirmative answers to the first two of these questions, and its negative answer to the third, petitioners believe the court next below has decided federal questions in a way probably in conflict with applicable decisions of this court.

The Government and People of Puerto Rico, as well as these petitioners, have at least a strong moral right, now that the questions have been squarely presented in this case, to be told by the highest judicial tribunal of the nation, whether the insular supreme court is permitted by the federal Organic Act provisions defining its powers, to call up for review by certiorari district court interlocutory orders of the nature of those vacated in these cases; and if so, whether that court is likewise authorized in any such case, despite the same federal statutory limitations, not merely to vacate the order reviewed, but to substitute its own order, directing disposal of the testamentary estate, in lieu of that vacated, while holding in effect that the district court had no jurisdiction even to entertain the motion on which the vacated order was based.

All concerned need very much to know upon the highest possible authority, whether under existing federal laws, the insular supreme court, through certiorari to a district court, can itself derive jurisdiction over a testamentary estate, sufficient to enable it to give orders as to the custody and administration of the assets, while at the same time holding the district court from which the case came devoid of any such jurisdiction.

Petitioners believe also that in affirming the insular supreme court's judgments in Case No. 1517 (summarily terminating judicial administration of the estate, and requiring the executor immediately to surrender custody of its assets and his unfinished administrative functions to the heirs jointly), the Circuit Court of Appeals has not only decided a federal question in a way probably in conflict with applicable decisions of this court, but has also sanctioned such wide departures by the insular supreme court from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

The federal question to which we refer in the last preceding paragraph is the third of those briefly set forth above under "The Questions Presented" (*supra*, p. 5). It may be stated even more succinctly as follows: Can the insular supreme court, on certiorari to an insular district court, pass judgment against a party who has not been accorded notice, hearing and due process in the district court?

The Circuit Court of Appeals avoids this question, taking the view that the judgment of the insular supreme court does not bind Porrata, and that the parts of the insular supreme court's opinion relating to Porrata's rights, duties and obligations as testamentary partitioner, comprise *obiter dicta* (Op. C.C.A., R. 932). We think that view clearly erroneous; firstly, because Porrata's rights, duties and obligations as testamentary partitioner and personally, under the will and the contract of compromise, are inextricably bound up with those of the testamentary executor; secondly, because the mandatory judgment of the insular supreme court ordering the executor immediately to deliver the assets of the estate and surrender his remaining functions to the heirs jointly without accomplishment of the partition required by the will and the contract between the parties necessarily affects adversely substantial rights of Porrata; and thirdly, because the declarations of the

opinion amount to findings of fact and conclusions of law adverse to Porrata, which are in effect embodied in the judgment by its initial phrase: "For the reasons set forth in the foregoing opinion." (R. 121).

In any event, it is apparent that the affirmance of the judgment of the insular supreme court, if left undisturbed by this court, will leave the insular court very definitely committed to findings and conclusions damaging to the interests of Porrata, and which, although rendered without due process as to Porrata, will practically bar vindication of his rights, at least without another long and expensive course of litigation.

There remains, as a further reason for allowance of the writ prayed, the patent and inescapable nature of the error of local law involved in the judgments of the insular supreme court under consideration, and in the corresponding affirmatory judgment of the Circuit Court of Appeals. In its commendable desire to expedite the settlement of the Mercado estate, but unfortunately without due regard to statutory limitations upon its own powers, or the facts and circumstances of the case, the insular supreme court granted certiorari to the dissident heirs (respondents here); unjustly blamed the executor and partitioner for delays due in large part to the recalcitrant attitude and obstructive tactics of the respondents; in violation of applicable local statutes arbitrarily terminated the orderly judicial administration of the estate which had been in progress for several years with the tacit consent and recognition of the district court and all persons concerned; directed immediate transfer of the property of the estate and its further administration to the four heirs jointly; and, as the event now demonstrates, delayed indefinitely the ultimate lawful settlement and distribution of the estate.

The basic ostensible ground for this radical action was that there had never been any express or formal application for a judicial administration of the estate, as provided by

Puerto Rican law, and accordingly that no such administration had ever existed.

Brushing aside the facts that such an administration had actually been in progress for years, during which the district court, the executor, and all of the heirs had consistently regarded and treated the administration of the estate as judicial, and all had, in the original testamentary proceedings, repeatedly recognized and invoked the jurisdiction of the district court in estate matters; ignoring provisions of Puerto Rican law expressly requiring the judicial administration of testamentary estates in like circumstances; and adopting as its dominant criterion a mere technical matter of statutory form (the directory provision that judicial administrations of testamentary estates may be initiated by formal and specific applications), the insular supreme court abruptly took the administration and distribution of the estate out of the hands of the executor and partitioner designated by the testator, and out of the control and supervision of the district court, and handed it over to the joint care and custody of four heirs, already long seriously divided and unable to agree among themselves.

Accordingly petitioners urge that, even as a matter of purely local law, the judgments of the insular supreme court in these cases are patently and inescapably erroneous, and that the affirmance thereof by the Circuit Court of Appeals involves an unwarranted and improper extension of the rule of deference to decisions of the insular supreme court in matters of local law, as restated and clarified by this court in *De Castro* v. *Board of Com'rs*, 322 U. S. 451, thus calling for review and correction by this court upon that ground, in addition to the other grounds hereinabove indicated.

CONCLUSION.

For the reasons briefly outlined above, and more fully stated and discussed in the appended supporting brief, it is respectfully requested that this petition for a writ of certiorari be granted.

FRED W. LLEWELLYN,
PEDRO M. PORRATA,
Attorneys for Petitioners.

LEON, WEILL & MAHONY,
Of Counsel.

Supreme Court of the United States

OCTOBER TERM, 1945.

No. .....

MARIO MERCADO RIERA, EXECUTOR, ET AL., *Petitioners,*

v.

MARIA LUISA MERCADO RIERA DE BELAVAL, ET AL., *Respondents.*

BRIEF IN SUPPORT OF THE FOREGOING PETITION.

OPINIONS BELOW.

(1) The opinion of the Supreme Court of Puerto Rico, rendered July 14, 1943, supporting the three judgments of the same date from which the four appeals herein were taken, is not yet officially reported in English. The Spanish text appears in the advance sheets of Volume 62 of the Spanish Edition of the reports of that court (*Decisiones de Puerto Rico)*, number 3, November 1, 1943, beginning at page 368. A translation is in the transcript of record here, on pages 97 to 121.

(2) The opinion of the Supreme Court of Puerto Rico, rendered July 31, 1943, modifying the reference in its prior opinion above mentioned to the time taken by the district court to decide the motions in question, is not yet officially reported in English. The Spanish text is in the advance

sheets of Volume 62, *Decisiones de Puerto Rico*, number 3, November 1, 1943, beginning at page 391. A translation appears in the record on pages 130-131.

(3) The three opinions and orders of Judge Gadea Picó of the District Court of Ponce, rendered March 23 and 24, 1943, reversal whereof by the Supreme Court of Puerto Rico led to the appeals in this case, are in the record on pages 465-466, 467-476 and 476-478, respectively.

(4) A prior opinion of the Supreme Court of Puerto Rico, rendered April 29, 1938, relating to the powers and duties of Pedro M. Porrata as auditor-partitioner in the same testamentary proceedings, is officially reported in Volume 53 P.R.R., beginning at page 140, and also appears in the record on pages 856-863.

(5) The opinion of the United States Circuit Court of Appeals, rendered November 23, 1945, to which this petition directly relates, is reported in the Federal Reporter, Second Series, advance sheets, volume 152, No. 1, beginning on page 86. The text thereof also appears in the record on pages 912-932.

JURISDICTION OF THIS COURT.

See Petition, *supra*, p. 4.

STATEMENT OF THE CASE.

The estate in question is that of Mario Mercado Montalvo, a widower, who died at Guayanilla, Puerto Rico, August 22, 1937, possessed of real and personal properties appraised at about $1,300,000, with debts of about $400,000, leaving a will providing for numerous cash legacies aggregating in excess of $280,000 (Inventory, R. 548-557), bequeathing the remainder of his estate in equal shares to his four children, Mario, Margarita, Maria Luisa and Adrian, all adults; naming his eldest son, Mario, as his testamentary executor; and appointing his "intimate friend," Pedro M. Porrata,

as partitioner of his estate (Will, R. 512-515). At the time of the death of the testator, all of the heirs were in Puerto Rico, except Adrian, who was then residing in Rome, Italy. (R. 779).

The principal incidents leading up to and attending the present controversy, arranged in chronological order, showing dates and appropriate references to the record, are summarized in the foregoing list entitled "Chronology," immediately following the tables and preceding the title page of this brief (*supra*, pp. v-xii).

After having accepted his office as executor, and qualified therefor on August 31, 1937, and having received his letters testamentary on September 1, 1937, Mario Mercado Riera proceeded to handle the affairs of the estate, not as a Spanish or civil law executor, but as a general administrator under judicial supervision, conforming not to the old Spanish law provisions of the Civil Code of Puerto Rico (Sec. 814-833, Edition of 1930, pp. 181-195; Appendix B, *infra*, pp. 88-91), but to the Act Relating to Special Legal Proceedings, enacted by the Legislature of Puerto Rico March 9, 1905 (Laws of P. R., 1905, p. 137 *et seq.*) as amended by the Act of March 8, 1906 (Laws of P. R., 1906, p. 165 *et seq.*), and embodied in the Code of Civil Procedure of Puerto Rico, Edition of 1933, as Sections 534-619, pages 227-259, pertinent extracts of which are in Appendix A hereto (*infra*, pp. 78-86), providing for the judicial administration of testamentary estates along lines generally like those in vogue in the states of the United States.

He immediately assumed the custody and management of the properties of the estate, as provided by Sections 567 and 571 of said Code of Civil Procedure (App. A, *infra*, pp. 80-81). He began and continued to collect debts due the estate and to pay off the indebtedness of the estate, thus exercising powers beyond those prescribed for executors by Section 824 of the Civil Code (App. B, *infra*, p. 89). He began and continued to pay off the cash legacies bequeathed by the will, and to pay the four annuitants their

prescribed monthly payments. He began and continued to prepare an inventory of the estate and to file quarterly reports, as required respectively by Sections 568 and 587 of the Code of Civil Procedure, Edition of 1933 (Secs. 35 and 54, Act Relating to Special Legal Proceedings; App. A, *infra*, pp. 80, 82). All this is shown by his original final accounts of the executorship, covering the period up to March 4, 1940 (R. 234-242), by his motions for extensions of time to complete the inventory (R. 199, 201-202), by his motion for the fixing of a term for filing objections to his first quarterly accounts (R. 201-202), and by paragraph "Second" of the "Contract of Compromise" of September 9, 1938 (R. 528).

Many questions arose during the administration of the estate. The assets were of various kinds, personal property and real estate holdings, both city and country. The federal Internal Revenue Commissioner claimed an inheritance tax on the whole estate, because of a $200,000 deposit the testator had in New York, in the National City Bank, at the time of his death; but was finally persuaded that the federal tax should be levied only on that $200,000 on deposit in the mainland. Questions arose, likewise, on the insular inheritance tax, necessitating appeal to the insular Board of Equalization and Review before it was compromised and the tax finally paid to the insular treasurer in March, 1940.

Other controversies arose among the heirs themselves. One sister, Margarita, has always remained neutral on these matters, and has indicated, on the whole, agreement with the executor, the elder brother Mario, appellant below, petitioner here; but the other sister, Maria Luisa, and the younger brother Adrian, appellees below and respondents here, have been hypercritical of both the executor and the partitioner from the start, and have raised objections at every step.

On September 9, 1938, the executor and the other three heirs, with their respective spouses, and Pedro M. Porrata,

as testamentary auditor-partitioner, entered into what is called the "Contract of Compromise," by which they sought to settle certain differences that had arisen between the heirs with regard to their relations and interests both as copartners in the partnership of Mario Mercado é Hijos, and as heirs of the estate of their father (R. 527-548). It should be observed that this contract tacitly recognized the existence of the testamentary proceedings as a judicial administration of the estate, and tacitly contemplated a continuance thereof to normal conclusion. This is made clear not only by the above mentioned paragraph "Second," expressly referring to Action No. 782 and the quarterly accounts "offered in said action" (R. 528), but also by Part "Third," subparagraph (a), referring to the inventory attached to the contract and providing that it be filed in the district court for the purposes of actions numbers 782 and 1213 (R. 539); and subparagraph (g) providing for a final account to be rendered by the executor, "which, of course, shall include all of the quarterly accounts which must be rendered within fifteen days* following the execution of this document," and for submission to the court of any controversies or differences arising thereon unless an amicable agreement should be reached within five days after demand by any party (R. 543). It should also be observed that the contract was not self-executing as to the distribution of the estate, but provided expressly for the

* The executor explained in his protest of September 6, 1940, against a proposed immediate hearing at that time upon objections raised by the present appellees to his then pending but unfiled final accounts, in substance that this 15-day limit was left in the contract because the draft had been prepared that way, and because the parties were in a hurry to return to their homes, although all well knew that the executor was leaving next day for an indefinite absence in the United States to settle disputed inheritance tax claims of the United States and the State of New York against the estate, and would be unable to conform to any such limitation for that reason, as well as the further reason that the claim of the Puerto Rican government for inheritance taxes against the estate was also at that time in dispute and litigation (R. 248-253).

preparation by Mr. Porrata, as auditor-partitioner, within ten days from the payment of the inheritance tax on the estate, of his report or deed of partition, and for execution of said report or deed by him and by the four heirs. [Subparagraph (l) [ell] and (m); R. 544-545].

On March 16, 1940, the respondents again definitely recognized the general testamentary nature of the proceedings in District Court Civil Action No. 782, when, without any attempt at amicable agrement, much less any failure of such an attempt, or the lapse of five days thereafter as provided in the contract of compromise, *supra*, they abruptly served upon the attorneys for the executor (not upon the executor in person as would have been necessary to institute a new and separate proceeding) and filed in said action their formal objections to certain items of the executor's final accounts of March 4, 1940 (R. 225-234).

Yet again they extended such recognition on June 7, 1940, when they served on the executor (through his attorneys), and filed in the district court, supplemental objections to the same accounts (R. 242-244); and on August 27, 1940, when they similarly served and filed their motion that the court set their objections to said accounts down for hearing (R. 245-247).

And they were actually before that court in the same proceedings at frequent intervals, on 31 different days, during the period November 12, 1940, to May 27, 1941, pressing their objections to the final accounts of March 4, 1940, without any suggestion whatever that the executorship was only a Spanish law executorship and had already expired, or that the court lacked complete jurisdiction (R. 287-348).

As late as October 27, 1941, the respondents were still regarding and treating Civil Action No. 782 as a general judicial testamentary proceeding, as witness their petition served on the executor (again through his attorneys of record in that case) and filed therein on that day, praying for orders requiring the executor to make immediate delivery to them of their respective shares in the estate, and to

render supplementary accounts from March 4, 1940 down to date, regardless of the then current pendency of their objections to the prior final accounts, which objections had been fully heard by Judge Sepulveda but were then still awaiting his adjudication (R. 348-360), that petition being the initial incident leading ultimately to the certiorari proceedings in Puerto Rican Supreme Court No. 1517.

It was not until November 26, 1941, by their motion filed on that date (R. 380-381), to quash the service on them through their attorneys of the prior motion of Messrs. Zapater and Ochoteco to fix the fees of the latter as attorneys for the executor, that the respondents first advanced their present contention that the executorship had expired under the old Spanish law in September, 1939, more than two years before—two years and more during which they, as well as the district court and all others concerned had been uniformly treating the proceeding as one of judicial administration under the pertinent provisions of the Code of Civil Procedure.

Meanwhile, the respondent Adrian Mercado Riera, having returned from Italy late in November, 1937, filed on January 24, 1938, in the same District Court of Ponce, his petition (R. 774-781), to be adjudged an acceptor of his inheritance "with benefit of inventory", and for a judicial inventory of the estate, a proceeding authorized by sections 964 to 988 of the Civil Code of Puerto Rico, Edition of 1930, pages 209-213; Appendix B (*infra*, pp. 91-95), designed to limit the liability of the accepting heir for debts of the estate, and necessarily involving judicial administration (*ib.*, Secs. 980 and 981; App. B, *infra*, p. 94). That petition and the subsequent proceedings relating thereto were designated in the district court as Civil Action No. 1213. However, all of the heirs, legatees and creditors of the estate were given notice personally or by publication (R. 820-848), both the executor and the auditor-partitioner duly made appearances (R. 788, 790-793, 802-806), the entire proceedings were so closely related to those in Civil

Action No. 782 as to be practically part and parcel thereof; and, as above mentioned, the heirs in their contract of compromise of September 9, 1938, referred to both of these actions, and included an agreed inventory of the estate to be filed in both (R. 528, 539).

The above-mentioned petition of the respondents filed October 27, 1941, for immediate and unconditional delivery of their inheritances; their above-mentioned motion to quash service on them through their attorneys of the motion of Messrs. Zapater and Ochoteco concerning attorneys' fees; and another motion of the appellees filed December 14, 1942 (R. 461-462) to quash service on them through their attorneys of the executor's motion concerning funds to pay legacies (R. 377-378); were all finally argued and submitted to the district court on the date last mentioned (R. 462-464), and were denied by that court on March 23 and 24, 1943, by three separate orders in Action No. 782, the court holding in substance that Civil Action 782, if not so from the beginning, had become a judicial testamentary proceeding by virtue of its close relation to the ancillary proceeding No. 1213, and by the tacit consent of the heirs in permitting without objection the continued administration of the estate by the executor, and in ratifying and continuing it in the contract of compromise (R. 461-462, 465-466, and 467-476).

On April 1, 1943, respondents filed in the Supreme Court of Puerto Rico their three separate petitions (R. 1-12, 40-58, and 165-176) for certiorari, to review the three orders of the district court last mentioned, and the petitions were given three separate docket numbers, namely:

S. C. No. 1516 Attorneys' fees matter;

S. C. No. 1517 Delivery of inheritance matter; and

S. C. No. 1518 Funds to pay legacies matter.

The three cases were all argued on May 24, 1943 (R. 23, 96, 181); and on July 14, 1943, the Supreme Court of Puerto

Rico rendered its opinion in No. 1517 (R. 97-121), holding in substance that there had been no judicial administration of the estate, that the executorship was governed by the old Spanish law embodied in the Puerto Rican Civil Code limiting the term of an executor to two years unless a longer term had been definitely fixed by the will or granted by unanimous consent of the heirs and legatees, and that accordingly the terms of both Mario Mercado Riera as executor and Pedro M. Porrata as auditor-partitioner had automatically expired in September, 1939. On the same day that court entered its three separate judgments, vacating the order of the district court under review in each case, and in No. 1517, substituting an order directing the executor to proceed immediately to deliver the estate to the heirs and to render supplementary final accounts (R. 24, 121 and 181-182).

Thereupon, on July 28, 1943, the executor appealed to the United States Circuit Court of Appeals from each of the judgments last mentioned (R. 24, 123 and 182), and the auditor-partitioner, who had intervened by special appearance in No. 1517, also appealed to that court from the judgment in that case (R. 126); thus presenting the four appeals subsequently consolidated there for hearing and decision.

On or about August 7, 1943, the executor, in order to reduce the amount and cost of the supersedeas bond and to avoid further action on his part as executor during the pendency of the appellate proceedings, complied conditionally with the opinion and judgments of the insular supreme court, by relinquishing the executorship, custody and administration of the estate to the heirs, expressly stipulating in that connection that he did so "without prejudice to the appeal filed by the executorship from the judgment of the Supreme Court of Puerto Rico of the 14th of July, 1943, in cases numbers 1516, 1517 and 1518" • • • "and in order not to take any action whatsoever concerning the

properties during the appeal, and, of course, only under the compulsion of said judgment" (R. 155, 156-157).

On November 23, 1945, the Circuit Court of Appeals rendered opinion and entered judgment affirming the judgments of the insular supreme court (R. 912-933). A petition for rehearing was denied January 3, 1946 (R. 933).

SPECIFICATION OF ASSIGNED ERRORS.

These are set forth under "The Questions Presented" and "Reasons Relied on for Allowance of the Writ" in the foregoing Petition (*supra*, pp. 5-6, and 6-9).

SUMMARY OF ARGUMENT.

The foregoing petition should be granted because:

1. The insular supreme court was wholly without jurisdiction on certiorari to review any of the orders which it undertook to review and vacate in these cases. Its jurisdiction is crystalized and limited by Section 40 of the fedral Organic Act for Puerto Rico, March 2, 1917 (39 Stat. 965) to such as it possessed at the time of the enactment of that Act, and according to its own decisions up to that time did not include jurisdiction to review on certiorari orders like those in question. The question involved is an important one of federal law which has not been, and which should be, settled by this court. See Point I (*infra*, pp. 22-23).

2. Under the same federal statutory limitation, even if the insular supreme court possessed jurisdiction to review those orders on certiorari, it clearly and manifestly exceeded that jurisdiction when it undertook, as it did in Case No. 1517, not only to vacate the district court order under review in that case, but also to substitute another and different order, directing disposal of the estate, in the place of that vacated. Here again, the question presented is an important one of federal law which has not been, and obviously should be, settled by the federal court of last resort.

And here, too, we believe the judgment of the Court of Appeals, by approving the assumption by the insular supreme court of administrative jurisdiction over the Mercado estate while that court simultaneously denies the possession of any such jurisdiction by the district court, sanctions so wide a departure from the accepted and usual course of judicial proceedings as to call for exercise of this court's supervisory powers. See Point II (*infra*, pp. 33-39).

3. With regard to petitioner Porrata, personally and as testamentary partitioner, the judgment of the insular supreme court in Case No. 1517 is violative of the due process and equal protection clauses of the Fifth Amendment to the Constitution and the Puerto Rican Organic Act of Congress, enacted March 2, 1917, because it adjudicates substantial rights of Porrata on the basis of the record of the district court in proceedings in which Porrata was not given notice and hearing in that court. The question involved is an important one of federal law, which has been decided by the appellate courts below in a manner probably in conflict with applicable decisions of this court. See Point III (*infra*, pp. 39-61).

4. The holdings of the insular supreme court that there was no judicial administration of the estate, and that the executorship and partitionership had automatically expired in 1939, together with its three judgments based on those holdings, are all clearly and inescapably erroneous, even as a matter of purely local law; because such administration was required by mandatory provisions of both the substantive and the procedural laws of the Island; because from the beginning of the proceedings continuously for a period of more than three years, all of the parties concerned, as well as the District Court of Ponce, repeatedly and continuously recognized, treated and conducted the administration of the estate as judicial; and because even if the executorship had expired as held by the court below, its judgment summarily terminating the judicial proceedings and requiring immediate delivery of the custody and

administration of the estate to the heirs was in direct and irreconcilable conflict with mandatory provisions of local law. The affirmatory judgment of the Circuit Court of Appeals involves an erroneous extension of the rule of deference, thus demanding exercise of the supervisory powers of this court by certiorari. See Point IV (*infra*, pp. 62-76).

ARGUMENT.

POINT I.

Under the Federal Organic Act of March 2, 1917, the Puerto Rican Supreme Court was wholly without jurisdiction on certiorari to review the District Court orders in question.

A. Section 40 of the Organic Act for Puerto Rico of March 2, 1917 (39 Stat. 951, 965) provides:

> "Sec. 40. That the judicial power shall be vested in the courts and tribunals of Porto Rico now established and in operation under and by virtue of existing laws. The jurisdiction of said courts and the form of procedure in them, and the various officers and attachés thereof, shall also continue to be as now provided until otherwise provided by law. *Provided, however,* That the chief justice and associate justices of the supreme court shall be appointed by the President, by and with the advice and consent of the Senate of the United States, and the Legislature of Porto Rico shall have authority, from time to time as it may see fit, not inconsistent with this Act, to organize, modify, or rearrange the courts and their jurisdiction and procedure, except the District Court of the United States for Porto Rico."

B. At the date of the enactment of the Organic Act of March 2, 1917, the Supreme Court of Puerto Rico was already in existence, functioning under the provisions of the former Organic Act, the "Foraker Act" of Congress of April 12, 1900 (c. 191, 31 Stat. 77 *et seq.*), Section 33 of which had provided:

"Sec. 33. That the judicial power shall be vested in the courts and tribunals of Porto Rico as already established and now in operation, including municipal courts, under and by virtue of General Orders, Numbered One Hundred and Eighteen, as promulgated by Brigadier-General Davis, United States Volunteers, August sixteenth, eighteen hundred and ninety-nine, * * * all which courts and tribunals are hereby continued. The jurisdiction of said courts and the form of procedure in them, * * * respectively, shall be the same as defined and prescribed in and by * * * said General Orders Numbered One Hundred and Eighteen * * *; *Provided, however,* That * * * the Legislative Assembly * * * shall have authority to legislate from time to time as it may see fit with respect to said courts, and any others they may deem it advisable to establish, their organization, the number of judges and officials and attachés for each, their jurisdiction, their procedure, and all other matters affecting them."

Pursuant to that authority in Section 33 of the "Foraker Act," the Legislature (Legislative Assembly) had, by "An Act Authorizing Writs of Certiorari," approved March 10, 1904 (Laws of 1904, pp. 132-133; now embodied in Sections 670 to 674 of the Code of Civil Procedure) authorized the insular supreme court and the respective insular district courts to issue writs of certiorari. Section 1 of that Act (now Section 670, Code of Civil Procedure), defined the writ of certiorari to be:

"A writ issued by a superior to an inferior court requiring the latter to send to former a certified copy of some proceeding therein pending, or the record and proceedings in some cause already terminated in cases where procedure is not according to the course of the law, and to complete the proceedings when the lower court refuses to do so upon erroneous grounds."

That statute was taken from continental American sources and was approved on the same day, March 10, 1904, as the [then] new "Code of Civil Procedure" (Laws of 1904, pp. 190-289), likewise taken from continental Ameri-

can sources, modeled directly upon the Code of Civil Procedure of California, and designed to establish new procedural methods in the courts of Puerto Rico.

C. The writ of certiorari thus authorized was plainly an extraordinary statutory remedy, to be employed only in strict harmony with the statute authorizing its use.

Accordingly, it was held by the Supreme Court of Puerto Rico, that,

> "considering the special nature of the law authorizing the issuance of writs of *certiorari*, * * * this remedy is of a privileged and extraordinary character and recourse cannot be had thereto until the adequate remedies to repair the injuries caused have been availed of" (*Arpin* v. *Del Toro, District Judge* (1905), 8 P. R. R. 276, 278);

that it will issue only to correct errors of procedure,

> "when the proceedings fail to conform to the law, but *not when it is based upon error of law,* * * * although described by counsel as an error of procedure" (*Fernandez* v. *District Court* (1904), 6 P.R.R. 202, 203; italics supplied);

that (*Delgado* v. *District Court of Mayaguez* (1905), 8 P.R.R. 484, 485);

> "The court will not grant a writ of *certiorari* where there is a plain and adequate remedy in the ordinary course of the law";

and that (*ibid.*, at p. 486);

> "In the ordinary suit where errors are committed the proper way to correct them is by appeal";

and (*Subirana* v. *Padilla, District Judge* (1907), 12 P.R.R. 72, 75-76);

> "But such writ never lies when an appeal may be taken for the purpose of establishing the legal procedure. * * *

"This decision" [*of the District Court*] "is an important one * * *.

"This being the case, *an appeal lies therefrom * * * which is the proper remedy* for the correction of all the errors which may have been committed in said decision, *and it excludes the privileged writ of certiorari applied for*" (italics supplied).

D. Nor could certiorari issue to supply a remedy by which to review an order of a district court that was not a "final order" in its character, and therefore, was not appealable to the insular supreme court under the Code of Civil Procedure, Section 295, of which (App. A, *infra*, p...) permits an appeal only from a "final judgment"; and from some other specified types of orders. Concerning an attempt to make use of certiorari to review an order not appealable to it under that provision of the Code of Civil Procedure, the insular supreme court said, on May 2, 1911 (*Hernandez* v. *District Court*, 17 P.R.R. 498, 500);

> "Such determination cannot be disturbed by us through *certiorari*, which remedy has not been established to take the place of a writ of error or appeal, as we have already held in the decisions of *Arribas* v. *The District Court*, 9 P.R. Rep. 436 [437-438], decided December 7, 1905, and in *Barrera* v. *The District Court*, 10 P.R. Rep. 181 [183-184], decided February 17, 1906."
>
> "* * * and that the will of the Legislature limiting appeals would be perverted or frustrated if, for the purpose of supplying the lack of an appeal, we should allow the remedy of *certiorari* where the same end as that of an appeal is sought."

And on June 28, 1913, the insular supreme court said, in denying certiorari sought to compel a district court to transfer a case to the federal court (*National Surety Co.* v. *Rossy*, 19 P.R.R. 897, 898):

> "We are inclined to agree with the *fiscal*, but the application here, however, is one in *certiorari, wherein our jurisdiction is limited to ordering the annulment of orders and judgments* when the procedure is not according to law." (Italics supplied.)

E. That was the undoubted and unquestioned rule, limiting the jurisdiction of the insular supreme court on certiorari from a district court, on and prior to March 2, 1917, the date of the enactment of the Organic Act of Congress for Puerto Rico, containing, in its Section 40 vesting "the judicial power," "in the courts and tribunals of Porto Rico now established and in operation under and by virtue of existing laws," and providing, as above quoted (39 Stat., at p. 965) that:

> "The jurisdiction of said courts, *and the form of procedure in them,* * * * shall also continue to be as now provided until otherwise provided by law." (Italics ours.)

F. *Under that provision of the Organic Act, the jurisdiction of the insular supreme court on certiorari to a district court could not be changed or enlarged except by act of the Legislature or by act of the Congress.*

The insular supreme court itself possesses no jurisdiction or power to modify or to enlarge the powers conferred upon it by the act of Congress. Broad as its powers are within its own field, it is yet not a constitutional court of the United States, but is simply a Congressional court possessing only such special and limited powers as have been conferred upon it by the Congress in the Organic Act and by the Legislature of Puerto Rico through enactments made pursuant to the Organic Act.

G. It is of course to be presumed that the Congress in directing by Section 40 of the Organic Act that the jurisdiction of the insular courts "and the form of procedure in them," "shall also continue to be as now provided until otherwise provided by law," intended to continue those laws in effect, *with the judicial interpretation that had theretofore been put upon them;* that is, by the insular supreme court or the federal courts,—in accordance with the established rule of statutory construction.

There has, since then, never been any statutory change in the insular law relating to certiorari. The original Act

of March 10, 1904, still remains in force (embodied now, as above indicated, in Sections 670 to 674 of the Code of Civil Procedure, Edition of 1933; see App. A, *infra*, pp. 86-87).

H. In the present case, the three judgments in the Supreme Court of Puerto Rico, affirmed by the Circuit Court of Appeals, were upon petitions by the present respondents for certiorari to review orders that had been entered by the District Court of Ponce denying three motions that had been made by the petitioners for certiorari there (respondents here) themselves, and from one of which denial orders they also took an appeal to the insular supreme court, but had then determined, as shown by the district court's record (R. 493) that it was "more expeditious and efficient" to seek a remedy by certiorari than to follow up their appeal.

Whether or not those denial orders were "final judgments" of the district court, in such sense as to be appealable, is immaterial; since, as above indicated, if not appealable, then it was the established rule of the insular supreme court, prior to the enactment of the present Organic Act, that the Legislature's determination by the Code of Civil Procedure that such an order should not be appealable, could not be construed as permitting evasion of the legislative intent by recourse to certiorari (*supra*, p. 25).

I. *Since the respondents had themselves, by submitting their several motions in the district court,*—to quash the service of notice upon them of the petition for attorneys' fees in the testamentary proceedings; for a peremptory order for the transfer to the heirs of the assets of the estate without awaiting payment of the debts and legacies and expenses of administration; and to quash the service of notice upon them through their attorneys of the executor's petition for leave to use monies of the estate and to sell properties to pay obligations and balances on the legacies,—the three motions, of the district court's denial of which they complain,—*necessarily admitted that that court had jurisdiction to grant the motions,* had it determined to do so; *it likewise necessarily follows that they were admitting*

that it also had jurisdiction to deny them, if it so determined,—as it actually did.

J. In other words, their complaint of the district court's action is not a complaint of its having acted at all; but is simply that, in their view, that court acted erroneously in denying their several motions; instead of granting them, as they thought it should have done. That is to say, their complaint really is that the district court *committed error*, or decided wrongly, upon the questions which they had themselves submitted for its determination. Under the limitations of its jurisdiction under Section 40 of the Organic Act, the insular supreme court possesses no power, on certiorari, to review alleged errors of that kind.

K. Not only have the objecting heirs (respondents here) failed to disclose any lack of jurisdiction on the part of the district court to render the orders under review, but an examination of their petitions for certiorari filed in the insular supreme court (R. 1-12, 40-58, and 165-176) fails to reveal anything to support the jurisdiction of the insular appellate court to vacate those orders, on certiorari, upon a theory that they constituted departures from the usual "course of the law" (Sec. 670, Code of C.P., *supra*, p. 23), or involved procedure "not according to law" within the meaning of the opinion in *National Surety Co.* v. *Rossy* (19 P.R.R. 897, 898; *supra*, p. 25). The applicable rule is paraphrased in paragraph 5(b) of Rule 38 of the United States Supreme Court (Revised Rules of 1939), where it includes among the cases in which a review on writ of certiorari will be considered, those where the lower court

> "has so far departed from the accepted and usual course of judicial proceedings * * * * as to call for an exercise of this court's power of supervision."

It is well established in Puerto Rico, by decisions of its supreme court, that even the erroneous sustaining of a demurrer to a complaint on the ground of lack of jurisdiction, although no right of appeal exists, will not support a petition for certiorari.

It was so held in *People* v. *Municipal Court* (1934), 46 P.R.R. 610, in which the municipal court had sustained a demurrer to a complaint charging false pretenses. The demurrer was predicated on a contention that the municipal court was without jurisdiction because the offense charged was a felony, while that court could try only misdemeanors. The municipal court concurred in that view. The government appealed to the district court, which disclaimed jurisdiction of the appeal on the ground that the statute allowed no appeal from an order sustaining a demurrer, but subsequently granted certiorari on the petition of the government, quashed the order of the municipal court sustaining the demurrer, and remanded the case to that court for further proceedings.

On appeal, the Supreme Court of Puerto Rico reversed the district court and annulled the writ of certiorari, remarking (p. 613):

> "We are inclined to agree with the Government that the crime charged was a misdemeanor and that, if susceptible of two interpretations, the prosecution for a misdemeanor lay.
>
> "The appellant maintains, however, that there was *no error of procedure* in the Municipal Court, and we agree. The complaint was filed in due order, and a demurrer was presented and heard. The Municipal Court may or may not have been right in declaring itself without jurisdiction, but it merely decided the questions before it." (Italics supplied.)

And in *Pedroza* v. *District Court* (1941), 58 P.R.R. 769, where certiorari to the district court had been granted to review an order denying a motion that certain defendants be summoned to show cause why they should not be punished for contempt in reoccupying lands from which they had been ejected pursuant to judgment in an unlawful detainer action, the court said (p. 770):

> "In other words, what happened was that the" [district] "court held that it had no authority to hear

> the case or to punish the defendants for contempt. This being so, the action of the lower court cannot be reviewed by certiorari, according to what this court has already decided."

Then, after citing and quoting from *Smallwood* v. *District Court,* 53 P.R.R. 707, 708; *People* v. *Municipal Court, supra;* and other authorities, the insular supreme court in the *Pedroza* case, proceeded (pp. 771-772):

> "Referring to the availability of the writ of certiorari, Ruling Case Law summarizes the decisions on the matter thus:
>
> 'Furthermore, it must be borne in mind that the functions of certiorari are simply to ascertain the validity of proceedings before a court of justice, either on the charge of their invalidity, because the essential forms of the law have not been observed, or on that of the want of jurisdiction in the court entertaining them. The writ has never been employed to inquire into the correctness of the judgment rendered where the forms of the law have been followed, and where the court had jurisdiction, and was therefore competent. Hence it has been held that the supervisory jurisdiction of the court on a certiorari must be restricted to an examination into the external validity of the proceeding had in the lower court. It cannot be exercised to review the judgment as to its intrinsic correctness, either on the law or on the facts of the case. The supervisory powers of the court should not be confounded with its appellate jurisdiction. 5 R.C.L. 21.' " (5 R.C.L. 251)

L. Here, as already pointed out, although the respondents alleged various faults on the part of the district court, to support the prayers for issuance of the writs by the insular supreme court, all of those allegations resolve, upon the simplest analyses, into mere claims of judicial *error* committed, if any error at all was committed, in interlocutory orders rendered by the district court, after due notice,

full hearing, and final submission by both sides, strictly within the usual and accepted course of judicial procedure.

M. Thus we find that on March 2, 1917, when the Congress prescribed so positively in the Organic Act for Puerto Rico, that the jurisdiction and form of procedure of Puerto Rican courts should be as then provided until otherwise provided by law, it had been definitely established that the insular supreme court could not grant certiorari to review alleged errors other than those of procedure. It follows that that rule was part of the then existing laws governing the jurisdictions and forms of procedure of those courts to which section 40 of the Organic Act relates, and which were adopted, continued and crystalized by that section subject only to amendment by law.

N. In that part of its opinion dealing with this phase of the case, the Court of Appeals dismisses the point with the simple, unexplained statement (R. 924):

> "We do not construe the Organic Act as crystallizing insular procedure. From its brief and general language we cannot draw the inference that Congress intended strictly to limit the Supreme Court of Puerto Rico only to such procedure as was in vogue on the date of the Organic Act. Instead we think that Congress in the above section [40] intended merely to provide a basic procedure which, within constitutional and statutory limits, the insular courts, like courts administering the common law, could develop as they saw fit."

O. It is not merely the form of procedure of the insular courts that petitioners contend was in effect crystallized, subject only to statutory amendment, by Section 40 of the Organic Act of March 2, 1917. It is also the more important "judicial power" or jurisdiction of those courts, as prescribed by the laws then in force in Puerto Rico and prior judicial interpretations of those laws, which we believe was so crystallized or fixed. In other words, our argument is not merely that the Supreme Court of Puerto Rico violated the Organic Act in matters of procedure by granting cer-

tiorari here, but also that that court was wholly without jurisdiction to grant certiorari here by reason of the limitations imposed by that Act.

As to whether the Court of Appeals entertains similar views regarding the effect of the limitations imposed by Section 40 on jurisdiction, the opinion is silent. However, since the terms of the statute relating to judicial powers are precisely the same as those relating to procedure, it seems properly inferable that that court does regard the statute as equally elastic in that direction.

Except for its bare reference to the brief and general language of Section 40, the opinion reveals no statement of the reasons for its above-indicated conclusions.

True the language of Section 40 is brief, and perhaps in a sense general, but it is none the less plain and mandatory in its provision that: *"The jurisdiction of said courts and the form of procedure in them, . . . shall also continue to be as now provided until otherwise provided by law"* (*supra*, p. 22).

Does this positive mandate leave any room for judicial interpretation of the quoted words as affording latitude to the insular courts to expand or shrink their own powers to suit their views of fit development of procedure or to meet any other exigency? Petitioners can perceive none. Moreover the mandatory intent of the provision is further convincingly evidenced by the immediately ensuing provision, expressly investing the Legislature of Puerto Rico with authority, from time to time as it might see fit, to organize, modify, or rearrange the courts and their jurisdiction and procedure.

P. We do not overlook the phrase "within constitutional and statutory limits," by which the Court of Appeals qualifies the extent to which it declares it believes Congress intended to permit the insular courts to go in developing their procedure as they might see fit. We do not contend, and we presume no sensible person would contend, that constitutional and statutory limitations generally, or those

with which we are concerned here, leave no scope whatever for court rules and decisions affecting judicial procedure. However, the question here is whether in this instance the insular supreme court, in granting certiorari, did or did not violate and exceed limitations upon its powers and procedure definitely imposed by the Organic Act.

Manifestly, it is no answer to that question to say that the Organic Act permits the insular courts to do things about procedure which are not forbidden by law. The question is answered by the Court of Appeals with a bald declaration in substance, as we understand the opinion, that the insular supreme court did not violate the Organic Act by granting certiorari herein, even if it had according to its own prior decisions possessed no power to grant certiorari in such a case at the time of the adoption of the Organic Act. Such an answer, we respectfully reiterate, is in direct conflict with the plain terms of Section 40 of that Act, and calls urgently for review and correction.

Q. At all events, it seems manifest that the question is one of great importance to the Puerto Rican government and people, as well as these litigants, and is one which has not been and should be definitely and finally settled by this court.

POINT II.

Even if the Insular Supreme Court had jurisdiction on certiorari to review the District Court orders in question, it certainly had no power to go further than to vacate them; and its substitution of a new affirmative order in No. 1517, directing delivery of the estate by the executor to the heirs, was clearly without jurisdiction.

A. As above noted, it had been definitely decided and established prior to the enactment of the Organic Act by the Congress in 1917, and was the settled law of Puerto Rico at that time, that, upon certiorari to a district court, the jurisdiction of the insular supreme court [*National*

Surety Company v. *Rossy*, supra, 19 P.R.R. 897, 898; *supra*, p. 25]:

> "*is limited to ordering the annulment* of orders and judgments when the procedure is not according to law." (Italics supplied.)

B. Therefore, the attempt of the insular supreme court in its order in No. 1517 (R. 121), to go further than simply ordering the annulment of the district court's order, and to assume jurisdiction to direct action by the custodian of the estate with relation to its property and administrators, was in excess of its powers under Section 40 of the Organic Act. It was, in addition, plainly, and even "inescapably," wrong, in any event. See Point IV, *infra*, pp. 62-76.

C. The only bases upon which the insular supreme court could take jurisdiction of the petitions for certiorari in these cases,—under its limited powers upon that writ, as crystallized by Section 40 of the Organic Act, and under the March 10, 1904, Act of the Legislature of Puerto Rico, as it had been consistently construed by the insular supreme court itself, prior to 1917, as above outlined,—were that either: (1) The district court was wholly without jurisdiction to entertain or to enter any order whatever upon the objecting heirs' (respondents') motions above outlined for the quashing of the notices of the motions of the attorneys for their fees (No. 1516 in the insular supreme court), and of the executor for leave to expend monies and pay legacies (No. 1518 in insular supreme court), and their motion immediately to transfer to them their respective inheritances (No. 1517, insular supreme court);—or else: (2) That the district court, although possessing jurisdiction, had so far departed from the regular course of judicial procedure as to require the interference of the insular supreme court by the extraordinary remedy of certiorari, for the purpose of annulling any orders so made by the district court.

D. The two heirs' certiorari petitions, all three, apparently went (R. 1-12, 40-58, 165-176) upon the theory that the district court,—(although they had been implicitly recognizing its jurisdiction in Civil Action 782 to pass upon the questions, by serving their petitions and motions on the executor through his attorneys of record, and by submitting them to that court for its decision),—had already long theretofore in reality completely lost jurisdiction of the entire subject matter of the testamentary proceedings, because of the automatic expiration [as they contended], back on September 2, 1939, of the term of office of Mario Mercado Riera as executor under his father's will.

E. Passing by for the moment the question of the correctness of their contention on that point, in any event it is clear, as to the jurisdiction of the district court after September 2, 1939, that one of two things must necessarily be true.

Either: (1) The court possessed jurisdiction; or else (2) It did not. There is no middle ground. *Confer Binderup v. Pathé Exchange,* 263 U. S. 291, 305-307. If the objecting heirs' contention was correct on both of its branches,—that is, that (a) the executorship had actually automatically expired by operation of law, on September 2, 1939; and (b) also that such expiration in itself entailed, in addition, automatically, the district court's immediate complete loss of all jurisdiction in the testamentary proceedings designated as Civil Action 782; *then the district court no longer possessed any power whatever in those proceedings to enter any order of any kind,*—or to entertain any motions of any kind in relation to the matter,—any more than any man in the street would have had any power to do so. And that would mean that no court order of any sort in those proceedings with relation to that property, or as to the transfer of the estate to the heirs, or anything else with relation to the filing of accounts or the payment of debts or legacies, —or anything else at all,—could be had in that court and proceeding.

[And that the only available remedy would be by the institution of independent actions at law by creditors or others interested in the property; or by one or more of the heirs against the others, if they could not wholly agree among themselves. A multiplicity of suits.]

On the other hand, if the district court's jurisdiction in that proceeding had not been thus terminated, then it was still in existence for all the usual purposes of the settlement and the winding up of the estate, the payment of the debts and legacies, and the expenses of administration, including attorneys' fees, the settlement of the executor's accounts, and supervision of the distribution of the assets to the heirs. It was necessarily either one thing or the other.

F. If the former,—that is, if its jurisdiction had wholly terminated,—then the district court possessed no power whatever in the premises; no power even to entertain at all the original petition and motions of these heirs, out of which these proceedings grew; and the insular supreme court consequently could not order it,—[and possessed no jurisdiction to order it],—to take any steps whatever with relation to the property; and therefore could not order it,—and possessed no power or jurisdiction to order it,—to enter an order, either in the district court's name or directly in the supreme court's name, as it apparently attempted or intended to do (R. 120-121), directing the executor to deliver the estate, and to render supplementary accounts to the other heirs, within a stated time. Or to do anything else.

G. On the other hand, if the district court's jurisdiction was still in existence, then it had jurisdiction to deny,—just as much as to grant,—those motions presented to it by the two heirs, the respondents here; and it was no more "exceeding its powers,"—nor falling into "jurisdictional error,"— by denying the motions, than it would have been by granting them. And in that case, whatever action the district court took on those motions, either the one way or the

other, could not serve as a basis for giving jurisdiction to the insular supreme court to interfere by certiorari.

If the district court's decision on the motions, or any of them, was wrong, then *it was simply error*, remediable by appeal to the insular supreme court if it constituted a "final judgment" or was otherwise appealable under the Code of Civil Procedure. And if not appealable under the Code of Civil Procedure enacted by the Legislature, then the insular supreme court possessed no jurisdiction, under Section 40 of the Organic Act crystallizing the applicable laws of Puerto Rico, to attempt to supply a remedy by certiorari.

In either event, the insular supreme court was wholly lacking in power, under that federal statute, to substitute its own affirmative order and judgment for that of the district court, as it undertook and attempted to do in Case No. 1517.

H. The Court of Appeals disposes of this point adversely to the executor and partitioner by quoting the Act of the Puerto Rican Legislature approved March 10, 1904, now embodied in the Puerto Rican Code of Civil Procedure as sections 670 and 671 (App. A, *infra*, p. 86), and then declaring (R. 924-5):

> "Clearly this statute gives the Supreme Court of Puerto Rico jurisdiction to issue writs of certiorari to the insular district courts 'in cases where procedure (in the inferior court) is not according to the course of the law', and on certiorari to order the inferior court 'to complete the proceedings' when it 'refuses to do so upon erroneous grounds.'"

and by appending to that declaration a footnote stating:

> "The language of this last clause [of] section 670, which antedates the Organic Act, so clearly gives jurisdiction to the higher court, upon reversal on certiorari, in a proper case to order the entry of a new order by the inferior court that we have not considered it necessary to discuss the appellants' second alleged federal question."

I. We fully concede that the insular supreme court, under the cited statute, has power *in a proper case,* upon reversal on certiorari, to direct the inferior court to complete the proceedings when the inferior court refuses to do so upon erroneous grounds. Had the insular supreme court in these cases contented itself with judgments reversing or annulling the district court orders in question, and remanding the cases with directions to the district court to dismiss the testamentary proceedings for lack of jurisdiction, the petitioners would not be here urging their Point II.

J. Instead of doing that, the insular supreme court, while holding in effect that the district court had never had, or had long since lost, jurisdiction over the estate, and while vacating its orders on that ground, nevertheless undertook simultaneously to assume that very jurisdiction over the estate which it was holding the district court did not have, and to enter judgment in the same testamentary proceedings which, according to its theory were not lawfully in court, directing the executor (former executor according to its theory) immediately to surrender custody of the estate and render supplementary accounts to the heirs jointly. In other words, the insular supreme court, on certiorari to the district court, vacates the order of that court for lack of jurisdiction in that court to make the order, and substitutes for the vacated order another which in effect it holds that court had no power to make in the proceedings under review.

K. Petitioners contend that such action of the insular supreme court was arbitrary, self-contradictory, and plainly in excess of its powers under the Organic Act. The affirmance of such action by the Circuit Court of Appeals, in our opinion, involves the sanctioning by that court of judicial action so far departing from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

In any event, the question presented under our Point II, like that presented under Point I above, is clearly an important one of federal law which has never been settled by this court, and which should be so settled for the guidance of the courts below, the information of the Government and People of Puerto Rico, and the complete and final administration of justice to the litigants in this case.

POINT III.

With relation to Petitioner Porrata, the judgment of the Insular Supreme Court in Case Number 1517, and the corresponding affirmatory judgment of the Circuit Court of Appeals, violate the due process and equal protection clauses of the Fifth Amendment and of the Puerto Rican Organic Act, because those judgments deprive him of due notice and hearing upon important issues thereby adjudged against him.

As the interests of the Petitioner Porrata, involved in this litigation, are largely separate and personal to him, presenting issues quite distinct in some important aspects from those with which the Petitioner Mercado is directly concerned, it is thought well here to summarize and restate separately the facts deemed essential to a consideration of this point, even though this involves some repetition.

Supplemental Statement of Facts.

(1) The testator, in his will, plainly evidenced his desire and intent that his residuary estate be distributed among his four heirs, in accordance with the will, through the services of a partitioner, by expressly appointing Pedro M. Porrata as partitioner of the estate (sometimes called commissioner of partition; also sometimes auditor-partitioner) (R. 513). Upon the death of the testator, Porrata formally accepted the office of partitioner and duly qualified therefor (R. 793-4).

(2) Adrian Mercado Riera, younger son of the testator, one of the respondents here, who was residing in Italy at the time of the death of his father, returned to Puerto Rico, and filed on January 24, 1938, before the District Court of Ponce, a petition accepting the inheritance with the benefit of inventory; which is a conditional way of accepting estates authorized by the Puerto Rico Civil Code (Sections 964-988; App. B, *infra*, pp. 91-95.) Adrian prayed therein for a judicial inventory, which was granted over the objections of the partitioner. *Porrata* v. *District Court*, 53 P. R. R. 140 (R. 856-863).

One year and eighteen days after the testator's death, Mario, María Luisa, Margarita, Adrian, as the four coheirs, Pedro M. Porrata, and the partnership Mario Mercado é Hijos, joined in a "Contract of Compromise," executed September 9, 1938, accompanied by the inventory of the estate, signed by the contracting parties as a part of the contract (R. 525-548).

(3) The contract of compromise contains, *inter alia*, the following stipulations (R. 543-545; italics supplied):

> "(i) Don Mario Mercado Riera, as executor of the deceased, shall within ten days following this date, remit a notice of decease to the Treasurer of Puerto Rico in connection with the estate of Don Mario Mercado Montalvo and, *upon the liquidation of the same*, the executor shall pay for the account of each heir, as well as that of the divers legatees, that part of the inheritance tax payable by each party, charging the amount paid for each party to said party's respective share in the estate."
>
> • • • • • • • • • •
>
> "(l) Don Pedro M. Porrata, as testamentary auditor partitioner of the estate of Don Mario Mercado Montalvo, being present at the execution of this document * * * *accepts and joins in said contract agreeing to all of its covenants*, terms and conditions insofar as they affect him as auditor partitioner of the aforesaid estate, undertaking to abide by its provisions and to comply with the letter of

the present contract without making any modification, addition or alteration in the partition of the estate to be referred to in the following paragraph."

"(m) The partitioner's report on the estate left at the death of Don Mario Mercado Montalvo, *shall be executed by aforesaid partitioner and aforesaid four universal heirs.* Said Don Pedro M. Porrata, present at the execution of this document, undertakes to have said partitioner's report prepared *within a term of ten days from the payment of the inheritance tax in this case and in accordance with the provisions of the present contract* * * * and said Mr. Porrata agrees that his total fee for the study, preparation and execution of aforesaid partitioner's report on the distribution of the inheritance as provided in this contract, with four certified copies to be furnished the heirs, should be and shall be twenty thousand dollars ($20,000), which the heirs agree to consider as a liability of the estate," * * *

(4) On March 9, 1940, after a long series of discussions with officials of the Federal Government over the applicability of the 1934 amendment of the federal estate tax law to the estate of the deceased, and a final settlement of that matter on terms highly advantageous to the estate (R. 408), and a similarly protracted controversy with the corresponding insular authorities, the executor finally settled and paid the inheritance tax upon the estate as liquidated by the government of Puerto Rico (R. 583-588).* For that very same day, Pedro M. Porrata, the partitioner, had

* Because the official receipt, although dated March 9, 1940, contains an entry to the effect that payment was made February 23, 1940 (R. 583), respondents have contended that the payment was actually made on the latter date. The payment was in fact made March 9, 1940, as Porrata would have been able to prove had he been accorded hearing in the district court. The tax having been computed with interest to February 23, the executor challenged the accuracy of the computation, offering to pay the amount finally accepted. His objection was ultimately sustained by the Treasurer, who then entered date of payment as February 23, to avoid unjust further charge of interest to March 9, actual date of payment.

called a meeting of the four heirs to discuss and execute the proposed partition deed, which meeting was postponed by reason of the illness of one of the attorneys for respondents, Celestino Iriarte, and at his request, to the 16th of March, 1940 (R. 770-771). At their own solicitation (R. 603, 770-771), Pedro M. Porrata then on March 14, 1940, sent to respondents (R. 597) an advance copy of his projected report or deed of partition, which, among others, contained the following covenants (R. 768-769):

> "It is hereby set forth that this Partitioner's Report is executed in compliance with the undertakings contained in the Contract of Compromise of the 9th of September, 1938, which is incorporated into this document and is made part of the same; it being understood that in case of conflict between the two, and in any other case, the provisions of the aforesaid Contract of Compromise shall prevail.
>
> "It is also expressly agreed, that the inclusion in this Partition of any item, either as liability or asset that should also be included in the accounts of the executor, as provided in the Contract of Compromise, does not imply, in any manner whatsoever, that the heirs accept and approve said accounts, said heirs being, at all times, free to impeach any item or any part of any item whether they be or not be included in this Partition; said impeachment to be made following the procedure set forth in the Contract of Compromise, it being understood nevertheless that the executor is free to present supplemental accounts; the corresponding reimbursements to be made at the proper time by fourths as the case may be."

In spite of the clauses designed to obviate all controversy, quoted above, Adrian and Maria Luisa Mercado Riera, respondents herein, refused to join in the signing of the partition deed, and subsequent attempts of these petitioners to bring them into conference thereon were unavailing.

(5) On the 27th of October, 1941, Adrian and Maria Luisa filed the petition for the delivery of the estate which originated the present controversy (R. 348-359). In their peti-

tion, they alleged the execution of the contract of September 9, 1938, specifically invoking the clauses in which Porrata was interested, as follows (R. 350, 354-355):

> "5. That on the 9th of September, 1938, aforesaid heirs of the said testator, Dona Margarita, Dona Maria Luisa, Don Adrian and Don Mario Mercado Riera, the latter on his own behalf, as executor and as managing director of the partnership Mario Mercado é Hijos, with the approval and acceptance of the partitioner, Mr. Pedro M. Porrata, executed a contract of compromise, acknowledged on the same date before Notary Fernando Zapater Martinez, of which, among others, the following are covenants and undertakings": [Here follow extracts from the contract, including the parts already quoted herein (*supra*, pp. 40-41)].

Although they quoted as the basis for their petition the contract of September 9, 1938, and although the quoted clauses revealed that Porrata's status, rights and duties were a real issue in the proceedings, Adrian and Maria Luisa did not make Porrata a party to the petition for the delivery of the estate nor serve him with a copy of it in any manner or form, obviously desiring and intending at that stage to exclude him from the hearing upon the questions raised by the petition. That fact clearly appears from the petition and from the appended oath and acceptance of service (R. 348-360), the latter showing that the petition was notified exclusively to Mario Mercado Riera through his attorneys of record, ***and not to Porrata.***

(6) Porrata, however, though not served with the petition by Adrian and Maria Luisa, or otherwise called into the proceedings, filed on November 26, 1941 (R. 385-395) a motion to be heard, entitled "Report of the Testamentary Partitioner," accompanied by a copy of the projected partition deed. He alleged that he had complied with the "Contract of Compromise" by preparing the partition deed, but that the two complaining heirs, respondents herein, were in disagreement in spite of every effort to secure

the execution of the projected partition. He prayed the court to hear the parties and to decide what changes, if any, should be made in the deed to make it acceptable and signable by the coheirs. The motion was notified to Adrian and Maria Luisa, who immediately filed with the Secretary of the District Court of Ponce a motion to quash service on them of the report, thus raising objection to the hearing requested by Pedro M. Porrata in the proceedings (R. 396-397).

(7) Having interposed this obstacle to the hearing sought by Porrata in the proceedings in which they were trying to oust him of his official status and rights under the will and the contract of September 9, 1938, respondents sought and obtained the hearing which ended with the judgment and opinion of the District Court of Ponce of March 24, 1942 (R. 467-476), whereby the petition for unconditional delivery was denied; and wherein the District Court of Ponce called attention to Porrata's interest and rights under the contract of September 9, 1938, and refused to pass thereon as the matter then stood, placing emphasis on the lack of notice and hearing, saying (R. 474-475, italics supplied):

> "And there is in the record of this case a 'Report of the Testamentary Partitioner' filed on November 26, 1941 in which the partitioner, Mr. Pedro M. Porrata, *sets forth the reasons why the partition prepared by him according to the agreement in the contract of compromise has not been executed. There is also a 'Special appearance requesting the quashing of the service or notice of a purported report of the Partitioner.'*
>
> "In his answer to the motion for delivery of property, which we are deciding and in the third paragraph thereof, *the executor states that he understands that said partition should be executed and that under the terms of the same each heir should be awarded and should receive that part of the inheritance to which he is entitled,* without prejudice ot any adjustment that might be necessary upon the decision of the objections

to the accounts rendered by the executor on March 6, 1940 filed by co-heirs Doña Maria Luisa and Don Adrian Mercado.

"Even though the executor in his answer does not specifically request that the execution of said partition be ordered, *it has been argued by the co-heirs Don Adrian and Doña Maria Luisa in their briefs, and orally, that aforesaid partition should have no effect whatsoever, as it was prepared and submitted after the date upon which it was supposed to have been delivered under the provisions of the contract of compromise heretofore mentioned.*

"We believe that no order should be entered with respect to the partitioner's report because, first, the motion with respect to the quashing of the notice of the partitioner's report heretofore set forth has not been set down for hearing and has not been argued, and second, because in order to order either one or the other, as the parties may request, it is necessary, first, to consider whether the partitioner had any just cause for rendering his report to the co-heirs on the date upon which he did so, and for that it is necessary that the partitioner and the objecting co-heirs put the court in a position where it could decide this matter of fact. Both in this action *as well as Number 1213, acceptance with benefit of inventory, etc., the Honorable Judge Sepulveda reserved to the partitioner his right to allege whatever he deem convenient 'in accordance with his duties and office'."*

(8) Judgment having been rendered against Adrian and Maria Luisa Mercado Riera, respondents herein, by the District Court of Ponce, which is the court with original general jurisdiction over surrogate proceedings under Puerto Rican Law, Adrian and Maria Luisa appealed to the Supreme Court of Puerto Rico (R. 491). The notice of appeal was filed April 2, 1943, and was notified to Henry G. Molina and Francisco Parra Capo as attorneys for Mario Mercado Riera and Doña Margarita Mercado Riera, but nowhere in the document of appeal does the name of Porrata appear; another conclusive evidence that Por-

rata was not then regarded by respondents as a party to the district court proceedings in No. 782 (R. 491-492).

(9) On the next preceding day, April 1, 1943, respondents herein had filed their petition for certiorari before the Supreme Court of Puerto Rico in case 1517, to review the judgment of the district court (R. 40-58). On April 2, 1943 the writ was issued, but it was not until April 22, 1943, that respondents herein, petitioners in certiorari before the Supreme Court of Puerto Rico, in belated recognition of the fact that Porrata was and had always been a necessary party to their proceedings, notified him of Certiorari No. 1517 (R. 61-62). In serving this notice, the respondents were unquestionably guided by Rule 69 of the Supreme Court of Puerto Rico, which requires petitioners on certiorari to notify all parties interested in the proceedings below.

(10) Upon receipt of the notification, Porrata, as he had not been heard in the case before the district court, filed in the Supreme Court of Puerto Rico, May 24, 1943, a "Special Appearance for the Purpose of Raising a Constitutional Question" (R. 67-69), alleging that he had been served with a certified copy of the petition for certiorari filed by Adrian and Maria Luisa to review the order of the district court; and that, notwithstanding the fact that he, Porrata, had not been heard before the district court, as evidenced by the opinion of the District Court of Ponce (R. 474-475), they, Adrian and Maria Luisa, were trying to have the Supreme Court of Puerto Rico pass upon his rights and duties without notice and hearing. Porrata prayed that the writ be quashed on the ground that the insular supreme court had no jurisdiction to pass upon his contractual rights and duties without compliance with the constitutional requirements of notice and hearing before the court where the proceedings originated.

(11) The case was heard before the insular supreme court, and judgment was rendered July 14, 1943, reversing the judgment of the District Court of Ponce, in an opinion

and judgment from which, for the immediate purpose, we set forth the following extracts:

"In another proceeding, case No. 802 of the lower Court, instituted by Pedro M. Porrata, the latter obtained a judgment, on September 8, 1937, acknowledging his authority as commissioner, and in that same proceeding the court granted him an extension until September 6, 1939, to perform his functions. Since then he has not been granted any further extension.

"On January 24, 1938, heir Adrian Mercado Riera brought in the district court proceeding No. 1213 *in re* beneficiary acceptance of the inheritance and on the same day he obtained an order summoning the parties concerned and ordering the executor to appear 'with a full statement and appraisal of the assets and liabilities of the estate of the ancestor Mario Mercado Montalvo, as well as any other information necessary for the preparation of the inventory of the properties of the aforesaid decedent.' (The sixty-day extension allowed to the executor on September 10, 1937, in proceeding No. 782, had expired without said inventory having been filed.) Thereupon Commissioner Pedro M. Porrata intervened in the beneficiary proceeding seeking to set aside the order of January 24, 1938, whereby the executor was required to prepare the inventory, on the ground that such preparation devolved upon the commissioner. His motion having been denied, he brought a certiorari proceeding in this court which led to our decision in *Porrata* v. *District Court, supra,* wherein the writ issued was quashed and the order of the lower court was left standing.

It was not until September 12, 1938, that the inventory in proceeding No. 1213 was filed, owing to the fact that on September 9, 1938, the heirs executed a compromise contract, of which said inventory was made part, as the latter had been accepted as correct by all the heirs (R. 100).

* * * * * * * * * *

"*In paragraph letter (m) Pedro M. Porrata undertook to 'perfect'*" [OBVIOUS ERROR: see Contract of Compromise (R. 545). The proper word is 'prepare'] "*'the said draft of partition within ten days from the payment of the inheritance tax,' exclusively in accor-*

dance with the terms of the compromise contract, it being stated again that it could not be 'enlarged, except as regards the description of the hereditary estates or properties, nor modified or added to, or altered in any way'; and it was therein agreed that for the study, preparation and execution of the said draft of partition in the manner agreed upon in the compromise contract, the commissioner should be paid as compensation, chargeable against the estate, $20,000.00 (R. 103-104; comment in brackets and italics are supplied).

* * * * * * * * *

"Nor can it be maintained that the term of the executor" [obviously the court here intended to refer to the partitioner] "is still in force and that the partition should be made in accordance with the draft of partition prepared by him. As we have stated, the executor" [partitioner] "in the present case was granted by the lower court an extension until September 6, 1939, to fulfill his office. He has neither sought, nor has he been granted, any additional term. Under such circumstances it has been held by the Division of the Registries that:

" 'Bearing in mind, therefore, that it is the clear duty of the commissioner of partition to fulfill his office within a certain term, and that if such term is not expressly provided by the legislator," [testator!] "such omission must be filled applying by analogy that which is granted to executors, that is, a term of one year, it being understood that the lapse of said term without using his power constitutes a tacit renunciation thereof;

" 'Bearing in mind that as more than one year has elapsed from the death of the testator until the execution by the heirs of the deed of partition which has given rise to the present appeal, Section 1058 has not been infringed, inasmuch as, under Section 911, applicable also by analogy, if the executor allows the term designated by the testator or by law to lapse without fulfilling his office, the execution of the will of the testator devolves upon the heirs'; 96 J. C. 599, 601, 602." (R. 114-115; comments in brackets are supplied.)

* * * * * * * * *

"We say again that the powers conferred on the executor by the compromise contract were so conferred one year before the expiration of his term and that the short and precise terms therein fixed do not imply at all the extension of such term, but, on the contrary, that the heriditary estate should be delivered to the heirs. They apportioned among themselves the hereditary estate (subdivision (f) of the compromise contract) and the commissioner of partition, bearing this in mind, and, moreover, the fact that the heirs had 'agreed regarding the form and terms of the partition or distribution of the estate' (sub-division (1), compromise contract), likewise consented to said contract. *Neither the executor nor the commissioner complied, either within the terms fixed or subsequently, with the terms of the contract.* To hold that compelling the ex-executor to deliver the estate 'would amount to leave the performance of the compromise contract to the will of one of the parties,' as did the lower court, is not justified by the facts of the case. On the contrary, it may well be maintained that upon the expiration of the executorship and of the terms fixed by the compromise contract, neither of the heirs shall be given possession of the whole hereditary estate, inasmuch as the execution of the will of the testator devolves, under the law, upon all the heirs. Section 833 of the Civil Code." (R. 116; italics ours.)

* * * * * * * * *

"If the heirs in the case at bar had already accepted the inheritance and agreed upon its distribution, pursuant to the compromise contract of September 9, 1938, *the fact that the executor and the commissioner of partition had failed to perform its terms should not be ground for claiming, several years afterwards, that the heirs are not in agreement as to the way in which they should distribute the estate among themselves.*" (R. 119; italics ours.)

* * * * * * * * *

"JUDGMENT. San Juan, Puerto Rico, July 14, 1943. *For the reasons set forth in the foregoing opinion,* the petition herein is granted, and, therefore, the order made by the District Court of Ponce on March 24, 1943, is hereby vacated and another rendered instead order-

ing the ex-executor Mario Mercado Riera to proceed to deliver the estate left by Mario Mercado Montalvo to his heirs Maria Luisa, Adrian, Margarita and Mario Mercado Riera, in compliance with the compromise contract executed on September 9, 1938, and also to render them supplementary accounts as from October 27, 1941, when the former accounts were rendered, until the time of such delivery, for all of which he is allowed a term of sixty days." (R. 121; italics ours.)

The Question Presented by Porrata.

Could the errors incident to the failure on respondents' part to join Porrata as a party to the motion for the delivery of the estate (*supra*, p. 43), and their objection to Porrata's attempted intervention in that proceeding befor the District Court of Ponce (*supra*, pp. 43-44), be cured by respondents themselves instituting certiorari proceedings under Section 670 of the Code of Civil Procedure of Puerto Rico and serving Porrata a copy of the affidavit and writ?

Since Porrata, as shown by the contract of compromise (*supra*, pp. 40-41), by the petition for delivery filed by respondents (*supra*, pp. 42-43), by the order of the District Court of Ponce (*supra*, pp. 44-45), by the petition for certiorari (*supra*, p. 42-43), and by the decision of the Supreme Court of Puerto Rico (*supra*, pp. 47-50), was a party really interested in the judgment to be rendered in relation to the petition for delivery, could his status and rights under the will and contract of compromise of September 9, 1938, be adjudicated in certiorari proceedings instituted before the Supreme Court of Puerto Rico, for the sole purpose of reviewing proceedings before the district court wherein he was not allowed a hearing?

In short, can a judgment be rendered in Puerto Rico on appeal, or on review by certiorari, against a person, directly and adversely affecting his official and contractual rights and duties, without his having been accorded notice and hearing in the court where the proceedings originated?

Position of Petitioner Porrata.

Since Porrata was not joined as a party or served with a copy of the petition for the delivery of the estate, and, furthermore, was not allowed any hearing in the proceedings in No. 782 before the District Court of Ponce, the Supreme Court of Puerto Rico, in certiorari proceedings, or, for that matter, in any other proceedings instituted to review the order of the district court, was without lawful jurisdiction to render any judgment against Porrata or to take any action affecting Porrata's rights, for lack of the due process guaranteed by the Fifth Amendment and the first paragraph of Section 2, Organic Act for Puerto Rico (39 Stat. 951); and therefore, the insular supreme court clearly erred in reversing the decision of the District Court of Ponce in substance that no action could be taken in regard to the partition and delivery of the estate, unless and until Porrata was granted the hearing requested by him in that regard.

Opinion of Circuit Court of Appeals.

As pointed out in the foregoing petition (*supra*, p. 7), the Circuit Court of Appeals, in its opinion of November 23, 1945, evades the question raised by Porrata, by holding in substance that the judgment of the insular supreme court in Case No. 1517 does not bind Porrata or affect his interests.

The opinion declares that Porrata's "presence here is not easy to understand," and further that (R. 931):

> "In the first place it does not appear that he has any personal financial interest in any phase of the litigation before us on these appeals. His fee was agreed upon in the contract of compromise, and the appellees say in their brief and Porrata admitted in argument before us, that this fee has been paid in full."

That is clearly erroneous. Porrata's status, rights and duties under the will, and more particularly under the contract of compromise, including his right to compensation

for his services, were and are manifestly and necessa ily in issue in Case No. 1517, because the delivery of inheri ances sought by the respondents and decreed by the insul ar supreme court manifestly could not be carried out in th manner contemplated by the will, or prescribed by the co ntract, without a distribution of the residuary estate amo g the heirs by partition deed to be prepared by Porrata a d executed by himself and the heirs. It is true that the ex ecutor paid Porrata the amount of the fee allowed Porrata by the contract, but the corresponding item on the executo r's accounts has been formally challenged by the respond nts, by objections filed in the district court, upon the very g rounds urged by them in the present litigation, and erro eously sustained by the insular supreme court herein. The present record does not fully disclose those facts, because P orrata was given no hearing in the district court.

The opinion proceeds (R. 931):

> "Furthermore, if there is any question of fee in the background, the accounting proceeding, not this would be the appropriate place to raise it."

Here the court overlooks the obvious fact that the present litigation directly involves and affects the account ing for the estate, and that Porrata's right to retain the f e paid him by the executor will be seriously prejudiced if not wholly lost, by affirmation of the insular supreme court's judgment, so expressly based on findings and con lusions of that court to the effect that Porrata had failed in is duty as partitioner under both will and contract, and had ctually ceased in 1939 to hold office as such.

Next the Circuit Court of Appeals declares (R. 931):

> "In the second place Porrata is not officially affected by the judgments rendered by the court bel w. He never had any duty to administer the estate c r to account for it, nor did he ever have possession o any of the assets of the estate or any duty to turn it over to the heirs. His only duty is specifically to appo tion the assets and liabilities of the decedent among t e heirs when the estate is turned over to them by th e execu-

tor. * * * And he has no concern with the judgment on the petition of Maria Luisa and Adrian, since, although it orders the estate turned over to the heirs, it does not specifically apportion it among them, but only provides that it shall be divided according to the compromise contract, which Porrata says he has done and for which he has been paid."

The declarations last quoted are plainly erroneous in several particulars.

First, it is clearly wrong to say that Porrata never had any duty to administer the estate, or to account for it, or to turn it over to the heirs. The partition (distribution) of the estate was part of its administration, and obviously required the most complete and painstaking accounting by the partitioner for every asset and liability of the estate. This was a function of Porrata, both under the pertinent statutes, and under the contract of compromise. It was a function which could not be fully discharged under either the law, or the contract, until the partition deed had been executed.

Second, while it is true that the judgment of the insular supreme court does not specifically apportion the estate among the heirs, it is certainly not true that it provides that the estate "shall be divided according to the compromise contract." The judgment directs the "ex-executor Mario Mercado Riera to proceed to *deliver* the estate," not to *divide* it; and in view of the insular supreme court's findings and conclusions to the effect that Porrata's office of partitioner had expired in 1939, and that he had failed to discharge his duties as partitioner according to either the law or the terms of the contract, the quoted words must be taken to mean simple, outright delivery, without any prior or simultaneous partition (distribution) of the estate by Porrata or anyone else.

Third, it is quite misleading to say that Porrata claims to have divided the estate, and that he has been paid for doing so. Porrata claims to have prepared a draft of pro-

posed partition deed dividing the estate according to the provisions of the compromise contract, but he claims (and it is the undisputed fact) that the partition (division or distribution) of the estate has never thus far been accomplished, because of the obstructive tactics of the respondents. Furthermore, although the executor has paid Porrata the agreed partitioner's fee (apparently because the executor regarded the failure to consummate the partition as due to no fault of Porrata), nevertheless the validity of that payment has been challenged by these respondents on grounds which are in effect ratified by the judgment of the insular supreme court in these proceedings without notice or hearing to Porrata.

Referring to the adverse findings and conclusions of the insular supreme court concerning Porrata's status, functions and duties, expressly set forth in the opinion of that court and embodied in its judgment by reference, the Circuit Court of Appeals closes its discussion thereof in the following language (R. 932):

> "The above statements of the court are not necessary to its decision and so will not bind him [Porrata] in possible—from the history of this case we can almost say probable—future litigation with the heirs Maria Luisa and Adrian over the equitable division of the estate. But the short answer to Porrata is that only final decisions of the supreme court of Puerto Rico are reviewable by us on appeal (sec. 128 of the Judicial Code; 28 U. S. C., sec. 225) and the final decisions of the court below are embodied in its judgments, not in its opinion, and its judgments, as we have shown, do not affect Porrata. His fear that the above statements may be used against him in future independent litigation with the heirs over the specific apportionment of the estate does not give him standing to appeal. *Boston Tow Boat Co.* v. *United States,* 321 U. S. 632."

Certainly the insular supreme court regarded its statements concerning Porrata as necessary, among other considerations, to support its judgment in No. 1517. That they

were necessary for that purpose is further indicated by the fact that the present respondents, as petitioners in the insular supreme court, were openly and vigorously demanding the immediate and unconditional delivery to them of their respective shares of the estate, by the fact that they had belatedly endeavored to bring Porrata into the case as a party to the certiorari proceeding in that court and were seeking a judgment there which would practically eliminate Porrata from the picture; while Porrata, by special appearance there, was contending that the court had no jurisdiction to render the judgment there sought by the respondents, because it would necessarily prejudice his interests without notice and hearing.

Moreover the judgment actually rendered there, while expressly directed only to the executor, requires the latter *to proceed immediately to deliver* the estate to the heirs, and thus clearly implies that such *delivery* is to be accomplished without regard to Porrata and without completion of the unfinished task of partitioning the estate, required of Porrata by both the will and the contract between the parties.

Upon examining the precedent cited by the Court of Appeals in support of its holding that Porrata had no standing to appeal to that court, namely, *Boston Tow Boat Co.* v. *United States, supra,* we can discern no parallel in fact or principle between that case and this one. The Boston Tow Boat Company had intervened in a suit by a steamboat company to set aside an order of the Interstate Commerce Commission holding certain towing operations of the steamboat company to be within the application of the Interstate Commerce Act, and had appealed to the supreme court from a three-judge district court judgment dismissing the steamboat company's complaint. The tow boat company had no financial interest in the steamboat company, and was not in competition with the latter. The only interest the tow boat company had in the case lay in the possibility that it might incidentally establish a precedent tending later to bring the tow boat company's similar op-

erations within the application of the Interstate Commerce Act. The tow boat company was not even mentioned anywhere in the body of the district court opinion. *Cornell Steamboat Co.* v. *United States,* 53 F. Supp. 349.

In the present case, Porrata was manifestly a party in interest, and a necessary party litigant, from the beginning, as to the petition of the respondents in the district court for immediate delivery of their inheritances, which led to insular supreme court No. 1517. Porrata was the partitioner designated by the testator in the will to apportion and distribute the residuary estate. Porrata was further obligated to do the same thing by the express terms of the very compromise contract to which the insular supreme court opinion and judgment expressly refer and relate. These respondents belatedly recognized the necessity of Porrata's participation in this litigation, when they served him with copies of their petition and the writ in insular supreme court number 1517.

The whole theory of the opinion and judgment of the insular supreme court in number 1517 manifestly is that Porrata is *functus officio* as partitioner, both under the will (by alleged termination of the office in 1939), and under the contract (by alleged failure to discharge his duties thereunder within the time thereby prescribed). For these reasons that court arbitrarily commanded the executor immediately to deliver the estate to the heirs, without specific mention of Porrata in the judgment, and with the unavoidable implication that the executor was to accomplish the delivery without Porrata's intervention, and without any partition (allocation or distribution) of the estate among the heirs.

The Court of Appeals, while affirming the judgment of the insular supreme court, undertakes to construe it to mean something quite different; that is, simply to require an immediate surrender by the executor of the custody of the entire estate, together with any remaining functions of administration, to the four heirs jointly, leaving the

matter of the partition (distribution) of the residual estate among the heirs to be accomplished in the future, whether by the heirs jointly or by Porrata, is not clear. Petitioners urge, that such a construction of the judgment is so manifestly contrary to the intent of the court by which it was rendered, as to be wholly untenable on the face of the record. As the Court of Appeals was apparently convinced that the judgment of the insular supreme court should have been as thus construed, we respectfully urge that the Court of Appeals should have reversed the judgment, and remanded the case with instructions for further proceedings in conformity with that view, including assurance to Porrata of his constitutional rights of notice and hearing before the rendition of any judgment touching his status, duties and compensation as testamentary partitioner.

Applicable Decisions of This Court.

That a party litigant in an appellate court cannot there be confronted for the first time with a new issue of law or fact, upon which he has had no hearing in the trial court, and have such an issue determined against him by the appellate court, is a principle so well established in the fundamental law of American jurisprudence, that reported precedents disclose only rare instances in which any appellate court has been obliged even to consider a contention to the contrary.

In *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413, this court, in effect, recognized and applied that principle. The case involved the question of the constitutionality of certain Florida statutes authorizing issuance and levy of execution against a corporate stockholder, to the extent of any sum remaining unpaid on his stock subscriptions, upon the return *nulla bona* of execution against the corporation, without according prior notice and hearing to the stockholder. Coe had sued in the state circuit court to quash such an execution alleging simply that it had been issued

without notice to him and amounted to the taking of his property without due process of law; and that the statute permitting it was void under both the state constitution and the Fourteenth Amendment. The state court, while upholding the constitutionality of the statute, had granted the petition on the ground that "some preliminary steps" were necessary to support issuance of the execution.

The Fertilizer works had taken the case by writ of error to the Supreme Court of Florida, which had reversed the circuit court, upholding the execution as issued. Upon receipt of the mandate the circuit court, without further pleadings or evidence, had entered judgment denying the petition to quash.

Coe had then gone again to the state supreme court, where the last judgment of the circuit court had been affirmed, upon the ground, in substance, that Coe had not alleged in his petition any fact showing that he was not within the application of the statute, and had thus had and waived his opportunity to defend himself on any ground available under the statute.

Coe had then sued out a writ of error to this court, which reversed the state supreme court, holding the state statute unconstitutional for lack of due process, because it made no provision for notice and opportunity for hearing prior to issuance of the executions it purported to authorize. In this court the defendant in error argued, *inter alia*, that Coe was entitled to no relief because there was undisputed evidence that he had in fact learned of the execution before his property was sold or even his possession was disturbed, and therefore, it was contended, had had and waived his opportunity for hearing in that proceeding as to all questions upon which his liability depended.

This court disposed of that contention very briefly, as follows (237 U. S. 424):

> "The fallacy of this is that it ignores the issue of law raised by the petition of the plaintiff in error, and substitutes an issue of fact for which he was not sum-

moned and which he has not consented to litigate. To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits. *Rees* v. *Watertown*, 19 Wall. 107, 123."

In the case now at bar, too, the insular supreme court ignored the issue of due process raised by Petitioner Porrata's special appearance in that court; substituted issues of fact for which he had not been summoned, and upon which, although he had offered to litigate them in the court of first instance, he had been accorded no opportunity to be heard in that court; and proceeded thereupon to adjudicate those issues against him upon the fragmentary and incomplete facts disclosed by a record of proceedings in which he had had no day in court.

Even more clearly in point here is the opinion of this court in *Saunders* v. *Shaw*, 244 U. S. 317, a suit to enjoin the collection of a drainage tax in Louisiana. The drainage district had issued bonds payable out of the tax, and Saunders, who held some of these bonds, was allowed to intervene in defense. At the trial, Shaw, the plaintiff, offered evidence to show that his land was outside of the levee system that the drainage commissioners were building, and that it would receive no benefit. The defense objected and the evidence was excluded as inadmissible under the pleadings, but it was spread upon the record and completed for reference in event of need on appeal. The defense made no attempt to rebut fully the excluded evidence, and objected to cross-examination designed to show the physical condition of the property, contending that the question was not open, and this objection was sustained. Judgment was entered against the plaintiff, who appealed.

The Supreme Court of Louisiana, noting that the answer and testimony showed that the land was low and marshy, had not been benefited or drained and could not be drained

under the proposed system, reversed the judgment and granted an injunction against the assessment on the land. In short the state supreme court reinstated the issue ruled out by the trial court, upon which Saunders had not fully presented his evidence because of that ruling, and proceeded to adjudge that issue and the case against Saunders.

Saunders brought the cause to this court by writ of error, claiming deprivation of due process in violation of the Fourteenth Amendment, because the case had been decided against him without his ever having had proper opportunity to present his evidence. This court upheld that claim and reversed the state supreme court. Speaking through Mr. Justice Holmes, the court declared (244 U. S. 319):

> "Technically this [Saunder's claim] is true, for when the trial court ruled that it was not open to the plaintiff to show that his land was not benefited, the defendant was not bound to go on and offer evidence that he contended was inadmissible, in order to rebut the testimony already ruled to be inadmissible in accordance with his view * * * Probably the majority of the [State] Supreme Court thought that it was so plain on the uncontroverted facts that the case was within the principle of *The Myles Salt Company's Case* [239 U. S. 478] that to remand it would be an empty form—a mere concession to technicality. It may turn out so, but we do not see in the record an absolute warrant for the assumption and therefore cannot be sure that the defendant's rights are protected without giving him a chance to put his evidence in.
>
> "The question remains whether the writ of error can be maintained. The record discloses the facts but does not disclose the claim of right under the Fourteenth Amendment until the assignment of errors filed the day before the Chief Justice of the state granted this writ. Of course ordinarily that would not be enough. But when the act complained of is the act of the Supreme Court, done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for infraction of constitutional rights if the

party aggrieved in such a way could not come here. The defendant was not bound to contemplate a decision of the case before his evidence was heard and therefore was not bound to ask a ruling or to take other precautions in advance. The denial of rights given by the Fourteenth Amendment need not be by legislation. *Howe Telephone & Telegraph Co.* v. *Los Angeles*, 227 U. S. 278."

The analogy in principle between that case and this is quite plain. In that case, this court refused to permit the intermediate appellate court to entertain and adjudicate against one of the parties, an issue of fact upon which that party had not been fully heard. In this case, the insular supreme court entertained and undertook to adjudicate against Porrata, issues of fact upon which Porrata had had no hearing whatever in the court of first instance.

Conclusion as to Point III.

For the reasons above shown, we conclude, with respect to Point III, that the judgment of the insular supreme court and that of the court of appeals, do adversely affect substantial interests of the Petitioner Porrata; that those judgments deprive him of property without notice, hearing and due process of law in violation of the Fifth Amendment to the Constitution, as well as the first paragraph of Section 2 of the Organic Act for Puerto Rico (39 Stat. 951), because he was accorded no hearing before the district court upon those issues involving his interests which were adjudged against him; and that the only means of restoring to him the denied rights is the intervention of this court by granting of the writ of certiorari as prayed in the foregoing petition, and, in due course, the reversal by this court of the judgment of the Court of Appeals.

Manifestly the question presented under our Point III, is an important one of federal law, which has been decided by the appellate courts below in a manner conflicting with applicable decisions of this court.

POINT IV.

As a matter of local law the insular supreme court erred patently and inescapably in holding that there was no judicial administration of the estate and that the executorship and partitionership had expired in 1939.

A. In support of this point attention is first invited: (1) to the fact that at the time of the death of the testator, August 22, 1937, one of the heirs, Adrian Mercado Riera (one of the respondents here) was residing in Rome, Italy (Pet. re acceptance, par. 7, R. 774, 779); and (2) to the provisions of Section 558 of the Code of Civil Procedure, Section 25 of the Act of March 9, 1905, relating to special legal proceedings and particularly to testamentary proceedings, as amended by the Act of March 8, 1906 (L. of P. R. 1906, pp. 165, 166), which, quoting from the session laws last cited, reads in pertinent part (App. A, *infra*, p. 79):

> "Section 25. When all or one or more than one of the heirs are absent or have no legal representatives in the jurisdiction of the last place of residence of the decedent, or where the property is located," * * * "*the judicial administration of the property of the testator shall be necessary.*" (Italics ours.)

Of similar import and effect in this connection is Section 980 of the very Civil Code on which the insular supreme court based its conclusions that no judicial administration existed, and that the terms of office of both the executor and the partitioner had expired in 1939, for that section provides (App. B, *infra*, p. 94):

> "Sec. 980. Until all the known creditors and the legatees have been paid, it shall be understood that the estate is under administration.
>
> "The administrator, whether it be the heir himself or any other person, shall have, as such, the representation of the estate to exercise all the actions pertaining thereto, and answer all complaints instituted against the same."

Thus, it follows that the applicable basic statutes of the Island, both substantive and procedural, made mandatory a judicial administration of this estate, and a continuation of that administration at least until payment of all legacies and debts, facts which seem to have entirely escaped the attention of both the insular supreme court and the Circuit Court of Appeals.

B. Next it should be observed that in his petition for letters of administration, the executor appointed by the will, Mario Mercado Riera, although he did not at that time expressly ask for a judicial administration, nevertheless evidenced his intention not to act as a mere "Civil Law" executor, with only the limited powers conferred by Section 824 of the Civil Code (App. B, *infra*, p. 89), for he specified among the grounds stated for issuance of the letters sought (R. 191, 192):

> "for the purpose of enabling the petitioner to exercise his authority, as said testamentary executor *and also the custody of said properties;*" * * *

The custody of the properties of a testamentary estate administered solely under the Civil Law of Puerto Rico devolves immediately upon all of the heirs present, jointly, and not upon the testamentary executor as such. This is made plain by the opinion of the insular supreme court in Case No. 1517 (R. 116-119), and the authorities there cited and quoted, to-wit: 6 Manresa 749; *Perez* v. *Succrs. of M. Perez & Co.*, 41 P. R. R. 844, 845; *Perez* v. *Zeda*, 35 P. R. R. 303; *Ex parte Suan*, 27 P. R. R. 890; *Heirs of Pelliccia* v. *District Court*, 36 P. R. R. 588, 590; and *Crehore* v. *The Registrar*, 22 P. R. R. 30, 33.

So, the executor in this case, from the very beginning of the proceedings in the district court, was proposing to exercise a function not conferred upon executors under the old Spanish Civil Law, namely the custody and management of the properties of the estate, pending its final set-

tlement and distribution; and this without the intervention of the other heirs present which is expressly required in the case of the "Civil Law" executor (Sec. 824, Civ. Code; App. B, *infra*, p. 89).

C. And in the letters testamentary (decree) of September 1, 1937, actually granted upon the executor's petition above mentioned, Judge Sepulveda expressly referred to Section 597 of the Code of Civil Procedure, 1933 Edition (Sec. 64, Law of Special Legal Proceedings; App. A, *infra*, p. 83), and declared that those letters should

> "Constitute sufficient proof of his authority as such EXECUTOR, *with all the powers upon him conferred by the Law of Special Legal Proceedings.*" (R. 197; italics ours.)

It is logical to conclude that Judge Sepulveda, even at this early stage of the proceedings, regarded the executorship in this case as one of general administrative powers, not subject to the limitations of the Civil Code, for otherwise there is no reasonable explanation of his omission of any mention of that Code and his specific reference to the Law of Special Legal Proceedings. Indeed, such a conclusion receives further and convincing support from the mere fact of the granting of letters testamentary, for the Civil Code provisions relating to testamentary executors (Secs. 814-833; App. B, *infra*, pp. 88-91) include no authority for the issuance of such letters, and obviously contemplate performance of their functions by testamentary executors without any judicial intervention other than possible recourse to a district court under Section 827 for an extra extension of time for fulfilment of the office.

D. The Civil Code provisions regarding testamentary executors are silent as to inventory (Secs. 814-833; App. B, *infra*, pp. 88-91). The Law of Special Legal Proceedings (C. of C. P., Sec. 568; App. A, *infra*, p. 80), requires an executor to proceed within ten days after his appointment

to make an inventory of the real and personal property belonging to the estate. That the executor in this case, from the beginning, considered himself within the application of that requirement, is shown by his petition, filed September 10, 1937, in the district court, praying for a ninety days extension of time for preparation of the inventory (R. 197-198), and his similar application for a further 90 days extension of that time, filed December 6, 1937 (R. 200-201). Mr. Justice Todd of the insular supreme court, author of the opinion of that court in this case, but formerly a judge of the District Court of Ponce, shared the same view at that time, as witness his orders granting both extensions (R. 199, 201-202).

E. Nor is a "Civil Law" executor required to present quarterly accounts to the court or to the heirs. Again see Civil Code sections 814-833 (App. B, *infra*, pp. 88-91); but section 587, Code of Civil Procedure (Sec. 54 of the Act of 1905, Relating to Special Legal Proceedings; App. A, *infra*, p. 82) expressly requires such accounts to be filed in the district court. The executor in this case filed his first quarterly report in the District Court of Ponce on December 7, 1937 (R. 205-206), and continued thereafter to file such reports (R. 235, 528).

F. Further early recognition by both the executor and the district court, of the judicial administrative nature of the proceedings in that court, is found in the executor's motion, filed December 15, 1937, praying that a term be fixed by the court within which the heirs might file impeachments of the first quarterly accounts (R. 205-206), and the then District Judge Todd's order of December 20, 1937 (R. 208), denying the motion, not on the ground of lack of jurisdiction to entertain it, but on the ground that impeachments to quarterly accounts were not admissible under Sections 587 to 590 of the Code of Civil Procedure (Secs. 54 to 57, Act Relating to Special Legal Proceedings; App. A, *infra*, pp. 82-83).

G. The heir, Margarita Mercado Riera de Manc
corded similar recognition to the proceedings w
joined personally with her brother Mario, the exec
the "motion" filed December 15, 1937 (R. 207-208)
taking in event of successful impeachment of any
the quarterly accounts by any co-heir, to make res
"by consignation in the office of the Clerk of this H
Court" of the total amounts of the items rejected
decree of the court.

H. The objecting heir Maria Luisa, one of the
dents here, also treated the district court proceedi
executorship as judicially administrative, when
peared personally and voluntarily by motion filed F
11, 1938, to pray that the court deny further exte
time to the executor for the making of the inventor
Section 568 of the Code of Civil Procedure, *supra*
210).

I. Shortly thereafter, on February 21, 1938, th
mentary partitioner, Mr. Porrata, one of the pete testa-
here, filed his motion for leave to intervene in Civil
No. 782, and his proposed "bill for intervention," o
the making or filing of an inventory by the executo
grounds, in substance, that as the proceeding ther
the testamentary partitioner was the only person aun
by law to make an inventory of the estate, that the
had no powers except those authorized by Secti
and 825 of the Civil Code, and that Sections 35, 3
of the Law of Special Legal Proceedings (Secs. 5 and 37
and 570, Code of C. P.) had no application because
the executor nor any of the heirs had requested a
administration of the estate (R. 211-215). In sh
Porrata was then urging precisely the same co
which, more than three years later, after the pro
had much more definitely taken on the aspect an
of a judicial administration, the objecting heirs
dents here) adopted and advanced unsuccessfully
in the

district court, but ultimately with success in the insular supreme court.

The district court, having already definitely rejected that theory, by its order of March 2, 1938, in No. 1213 (R. 811-812; *infra*, p. 68), followed the same principle in this second instance, by simply denying Mr. Porrata's motion for leave to intervene, although expressly reserving to him his powers and rights as testamentary partitioner (R. 218-219). In other words the district court at that time, by necessary implication, held that the proceedings were of a judicial administrative nature, and the executor not restricted to the powers and functions prescribed for "Civil Law" executors by the Civil Code.

J. Meantime, as already mentioned, on January 24, 1938, one of the objecting heirs, the younger son, Adrian, had filed his petition praying that he be adjudged to be an acceptor of his inheritance under the will "with benefit of inventory," and that the executor be required to make a judicial inventory (R. 774-781). Although directly related to, and really part of, the main testamentary proceedings in Civil Action No. 782, involving exactly the same parties and issues, this petition and the subsequent proceedings therein were nominally treated as separate, and were designated as Civil Action Number 1213.

The proceeding thus initiated is somewhat loosely authorized by Sections 964-988 of the Civil Code (App. B, *infra*, p. 91-95). It may be accomplished either before a notary or in writing before the district court (*ib.*, Sec. 965). In the latter case a complete judicial administration is practically essential, if not indeed legally requisite, especially in dealing with a large and diversified estate, because of the various incidental statutory functions of the court, and the obvious need of the executor or administrator for the protection of judicial approval of inventory and accounts, as well as final discharge from further liability. *Gonzalez* v. *De la Guerra*, 46 P. R. R. 256, 260-263.

In the present instance the judicial administrative method was adopted and pursued. Upon the filing of the petition the district judge (Sepulveda) promptly entered an order in substance holding the petitioner to be an "acceptor, with benefit of inventory;" directing the executor to appear in court on a day certain with all data necessary for the preparation of an inventory; and directing issuance and service of summons upon each of the heirs and legatees under the will, and upon each of the creditors of the estate, to appear at the same time, should they so desire, to participate in the preparation of the inventory (R. 782-785).

The auditor-partitioner, on January 26, 1938, filed his motion for leave to intervene in Case No. 1213 (R. 788), and his petition (R. 790-793) that he be declared a party in interest therein. The court granted the motion and petition (R. 795). Mr. Porrata thereupon filed on February 10, 1938, his motion (R. 797-800) that the court vacate that part of its prior order in No. 1213, directing the executor to make the inventory, and instead order the testamentary partitioner to prepare the same, upon grounds substantially like those advanced in the partitioner's above mentioned subsequent motion of February 21, 1938, for leave to intervene in No. 782 (par. I, *supra*, p. 66), namely, in substance, that the executor had only the powers granted by the Civil Code, and that the preparation of an inventory of the estate was exclusively a function of the testamentary partitioner.

On March 2, 1938, the district court (Judge Sepulveda) denied Mr. Porrata's motion of February 10, 1938, citing, *inter alia*, Sections 586 [568?], 570 and 603 of the Code of Civil Procedure, Sections 964 *et sequitur* of the Civil Code, and *Gonzalez* v. *De la Guerra*, *supra*, with the plain implication that the court regarded a judicial administration and inventory necessary or at least appropriate (R. 811-812).

On the petition of Mr. Porrata, the insular supreme court granted certiorari to review the district court order last mentioned, but on April 29, 1938, annulled the writ, in effect

affirming the order of the district court. *Porrata* v. *District Court, supra* (R. 856-863).

While perhaps not in itself alone sufficient to establish the general administration of the estate as a judicial one, that decision did definitely determine that the proceedings upon Adrian's petition to be declared an acceptor of his inheritance "with benefit of inventory" were of a judicial administrative nature; and did much to cement the common understanding of the executor, the partitioner, the co-heirs and the district court, that the estate was under judicial administration,—[an understanding which they uniformly evidenced from that time on, until the present respondents elected, late in 1941, more than three years afterwards, to put forward their contention to the contrary].

K. Then followed the "Contract of Compromise" of September 9, 1938 (R. 524-558), in which the executor, his co-heirs, and the partitioner, all definitely recognized the judicial character of the administration of the estate, as set forth in the foregoing statement of the case (*supra*, pp. 14-15).

L. On March 6, 1940, the executor transmitted by letter of that date, to his co-heirs, for their approval, his "final accounts" up to March 4, 1940, consolidating prior quarterly accounts, and showing that he had been consistently from the beginning up to that time exercising the powers of a judicial administrator, holding custody of and managing the properties of the estate, collecting debts due the estate and paying debts owed by the estate (R. 234-242).

M. And the objecting heirs, Adrian and Maria Luisa, respondents here, as well as the district court and all others concerned, thereafter continued, as more specifically pointed out in our preceding statement of the case (*supra*, pp. 16-17), to regard and treat the administration of the estate as judicial, and the executorship as still in existence, right up to the time of the filing of the objecting heirs' mo-

tion of November 26, 1941, to quash service, which is the subject of the certiorari proceedings and appeal in Supreme Court No. 1516.

N. The insular supreme court, in its opinion in No. 1517, overlooking or ignoring many of the above mentioned evidences of the judicial nature of the executorship and administration of the estate, and merely remarking the absence of any formal application to the district court in either 782 or 1213, by the executor or any other interested party, expressly requesting a judicial administration, and the absence in either of those proceedings of any order formally or expressly decreeing such an administration (R. 104-105), proceeded, apparently on that ground alone, because no other ground is set forth in the opinion, to conclude in substance that there was and had been no judicial administration of the estate, and that the executorship was only that authorized and governed by the Civil Code.

Although the questions involved in those conclusions were obviously at the very root of the case presented, we find in the opinion of the insular supreme court little or no discussion of them. All that is said directly about them appears toward the end of the opinion, where the court declared simply (R. 120):

> "Neither within the proceeding regarding letters testamentary nor within the beneficiary acceptance proceeding, did the estate of Mario Mercado Montalvo ever become a judicial administration, and, as the executorship had expired, it devolves upon the heirs to execute the will of the testator regarding any particular where the executor has failed to act."

O. Did that court note and consider the fact that a judicial administration was expressly required under the circumstances by Section 558 of the Code of Civil Procedure (*supra*, p. 62); or the fact that in his petition for letters testamentary the executor expressly indicated that he expected to exercise custody of the properties of the estate,

a power not accorded to "Civil Law" executors (*supra*, p. 63); or the fact that the executor was from the beginning filing quarterly reports in the District Court required by the law of special legal proceedings and not by the Civil Code (*supra*, p. 65); or the fact that each and all of the parties directly concerned in the matter had continuously for several years been treating the executorship as one under judicial administration, by frequent submissions of matters to the court for judicial decision or action in the original testamentary proceeding, with service on the executor through his attorneys (*supra*, pp. 16-17); or any of the numerous other facts evidencing the common understanding of the district court, the executor, the other heirs, the partitioner, the legatees, and even the creditors, that the administration of the estate was under judicial jurisdiction and supervision in Civil Action 782 (*supra*, pp. 66-69)?

The answer to each of these queries manifestly is "No". In holding the executorship to have been exclusively of the "Civil Law" character, and the administration non-judicial, the insular supreme court obviously rested that holding on the sole and highly technical ground that no "judicial administration" had been *expressly* prayed or granted in the district court; thus disregarding the substance for the form, and violating, and permitting these respondents to avoid, the conclusive presumption and estoppel established by Section 463 (3) of the Code of Civil Procedure (App. A, *infra*, p. 78), that:

> "Whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he cannot in any litigation arising out of such declaration, act, or omission, be permitted to falsify it."

P. However, from the viewpoint adopted by the insular supreme court, its initial (and, as we believe, wholly er-

roneous) conclusion as to the Civil Law or non-judicial nature of the executorship and administration of the estate, made easy its disposition of the remaining questions. Proceeding from that premise, it was necessary, that court apparently reasoned, only to apply strictly the old Spanish Law of the Civil Code, as construed by the Spanish commentators, in order to reach the further conclusions that the executorship and partitionership had both expired automatically back in 1939, and that the district court had then lost jurisdiction, in those proceedings (district court number 782), to do anything further about the matter, except, perhaps, and even this exception would manifestly be illogical, to direct the executor summarily to turn over his uncompleted task and the properties of the estate to the heirs, and to render to them a final accounting.

The only possible objection to that theory apparently discerned by that court, lay in the provision of the Civil Code, itself, in Section 828 (App. B, *infra*, p. 90), authorizing the heirs and legatees, by common consent, to extend the term of an executorship for the time they might consider necessary; and the obvious consent of all of the heirs to such an extension implied in the contract of compromise of September 9, 1938 (R. 524-558) expressly requiring the executor to complete the payment of all legacies established by the testator (R. 540 and 543), to pay the Puerto Rican inheritance tax on the estate (R. 543), to do certain other things in connection with the estate necessarily involving delays in final accounting and distribution (R. 539, 544), to render final accounts to be submitted to the court in event of any controversy, unless amicable agreement should be reached within five days (R. 542-543), and to join in the execution of the report or deed of partition to be *prepared* by the partitioner within ten days after the payment, at some unforseeable future date, of the insular inheritance tax (R. 545).

That court summarily brushed this objection aside upon the highly technical ground (R. 113) that the legatees, who

outnumbered the heirs, and whose consent was necessary to extend the term of the executor under Section 828 of the Civil Code, *supra,* were not parties to the contract, and did not as far as the record discloses, expressly agree at any time to such an extension. But here again that court fell into the error of overlooking plain and necessary inferences from facts in the record. True there was no formal written agreement by the legatees to any such extension, but they necessarily knew the executor was continuing to represent and administer the estate, because they continued to receive from him regular and substantial payments of principal and interest upon their legacies, and to accept the benefits thereof (Partitioner's Report, Part 10; R. 736-743). Their unanimous consent to such continuance is clearly established on this record by the evidence of such knowledge and conduct on their parts, and the total absence of evidence of any objection thereto, by any of them.

However, in the same connection, the insular supreme court entirely overlooked other even more insuperable objections to its theories of no judicial administration, and of the prior expiration of the executorship, namely those objections arising from the plain terms of the statutes under this point first above quoted (*supra,* pp. 62-63), expressly requiring judicial administration in such cases, and continuance thereof at least until full payment of legacies and debts.

The inescapable nature of the error of the insular supreme court is even more convincingly revealed by consideration of the facts and circumstances of the case in connection with sections 588, 589, 590 and 592, of the Code of Civil Procedure (App. A, *infra,* pp. 82-83), expressly providing for the procedure to be followed in testamentary proceedings when an executor for any reason cases to be such, definitely requiring in such event a continuation of the judicial proceedings, the submission to the court of final accounts, the summoning of all parties for the hearing thereon, judicial approval thereof as rendered or modified,

and a final decree of distribution of the surplus "after payment of the debts of the decedent and the expenses for the administration."

In the present case, the insular supreme court held that the office of the executor had expired; that is to say, the executor had automatically ceased to be executor by reason of the expiration of his legal term of office, more than three years before. Upon that hypothesis, it was clearly necessary to observe the mandatory statutory requirements last above cited, and to provide for an orderly settlement of the affairs of the estate under judicial supervision. Did the insular supreme court so decree? It did not. Instead it summarily, in direct conflict with those statutory requirements, decreed an immediate delivery of the estate and the remaining functions of administration, settlement and partition, by the executor to the heirs jointly, leaving the rights and obligations of the executor, the heirs, the legatees, and the creditors unsettled, unadjudicated, and in a state of chaotic confusion, resolvable only by multifarious mutual agreements or a multiplicity of actions at law; while at the same time in effect annulling the status, duties, and rights (both statutory and contractual) of the petitioner, Mr. Porrata, without notice or hearing.

Q. The Court of Appeals, although recognizing "some force" in the argument that the foregoing considerations clearly call for a conclusion that the Mercado executorship was still in existence and under judicial administration in 1941 when the present litigation arose, nevertheless holds that the contrary conclusion of the insular supreme court was not only not patently erroneous, but "would seem to be patently correct" (R. 930). Like the insular supreme court, the Court of Appeals does not discuss specifically, or even mention, some of the most cogent grounds urged by the present petitioners in their briefs and argument before that court, and hereinabove set forth. For examples, that court summarily dismissed without specific mention our points that the insular supreme court disregarded sub-

stance for form; ignored express local statutes making judicial administration mandatory under the circumstances of this estate; failed to recognize the tacit consent of the legatees to extension of the term of the executor as provided by the contract of compromise, necessarily implied by their continued acceptance of payments from the executor; and violated the express terms of local statutes requiring continuation of judicial administration when an executor for any reason ceases to be such.

R. The judgments of the insular supreme court affirmed by the Court of Appeals judgment of which the present petitioners complain were patently erroneous, as a matter of local law, for yet another reason. We refer here to the second paragraph of Section 827 of the Puerto Rican Civil Code (App. B, *infra*, p. 90), which provides:

> "If after the expiration of this extension" [that granted by the testator to the executor] "the will of the testator should not yet have been complied with, the district court may grant another term for the time which may be necessary, in view of the circumstances of the case".

That statute, part of the same Civil Code on which the insular supreme court based its opinion declaring the executorship in this case to have lapsed by operation of law in 1939, clearly gives the district court discretionary power to extend the term of any executor for any reasonable period. The various proceedings and orders of the district court in Case No. 782, as shown by the record, hereinabove noted, and summarized in the preceding "Chronology" (*supra*, pp. v-xii), covering the entire period from the death of the testator down to and including the orders of 1943 directly involved here (many of them initiated by the respondents themselves after the alleged expiration of the term of the executor), manifestly constituted in substantial effect an exercise of that discretionary power, and thus accomplished a valid extension of the

term of the executor. This is particularly true of the three orders vacated by the insular supreme court, for they denied actual demands of the respondents, opposed by the executor, that the executorship be terminated; and thus plainly evidenced the intention of the district court to extend the term of the executor "for the time which may be necessary, in view of the circumstances of the case".

S. Our conclusion as to Point IV is that this case presents outstanding examples of errors by the insular supreme court in matters of local law, so patent, flagrant and inescapable that they fall well outside the protection of the rule of deference as restated and explained by this court in *De Castro* v. *Board of Commissioners*, 322 U. S. 451, and fully justify the intervention of this court by certiorari to review the affirmatory judgment of the Court of Appeals against which the foregoing petition is directed.

CONCLUSION.

Your petitioners respectfully and earnestly pray that their foregoing petition for a writ of certiorari to the Circuit Court of Appeals in this case be granted.

Date: March 2, 1946.

FRED W. LLEWELLYN,
PEDRO M. PORRATA,
Attorneys for Petitioners.

LEON, WEILL & MAHONY,
Of Counsel.

APPENDIX A.

Pertinent Extracts From the Code of Civil Procedure of Puerto Rico Edition of 1933.

TITLE XII—OF APPEALS IN CIVIL ACTIONS.

* * * * * * * * * *

Chapter II—*Appeals to Supreme Court from District Court.*

Section 295. (939 Cal.) An appeal may be taken to the Supreme Court from a District Court:

1. (*As amended by Act of March 11, 1908, page 84.*)—From a final judgment in an action or special proceeding commenced in the court in which the same is rendered, within one month after the entry of judgment.

2. (*As amended by Act of March 9, 1905, page 136.*)—From a judgment rendered on an appeal from an inferior court, within fifteen days after the entry of such judgment, should the value of the property claimed or amount of the judgment not including products and interest thereon exceed three hundred dollars ($300).

3. From an order granting or refusing a new trial; from an order granting or dissolving an injunction; from an order refusing to grant or dissolve an injunction; from an order dissolving or refusing to dissolve an attachment; from an order granting or refusing to grant a change of the place of trial; from any special order made after final judgment; and from an interlocutory judgment in actions for partition of real property, within ten days after the order or interlocutory judgment is made and entered on the minutes of the court or filed with the secretary.

* * * * * * * * * *

TITLE XV—*Introduction of Evidence in Civil Proceedings.*

* * * * * * * * * *

Chapter V—*Indirect Evidence, Inferences and Presumptions.*

* * * * * * * * * * *

Section 463.—(101 L.) (1962 Cal.) The following presumptions, and no others, are deemed conclusive:

* * * * * * * * * * *

3. Whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he can not in any litigation arising out of such declaration, act, or omission, be permitted to falsify it.

* * * * * * * * * * *

TITLE XVI—SPECIAL LEGAL PROCEEDINGS.

An Act Relating to Special Legal Proceedings, approved March 9, 1905 (Laws of P. R. 1905, p. 137, *et seq.*), as amended by the Act of March 8, 1906 (Laws of P. R. 1906, p. 165, *et seq.*), and embodied in the Code of Civil Procedure of Puerto Rico, Edition of 1933, as Sections 534 to 619.

[SUB]TITLE I—TESTAMENTARY AND INTESTATE PROCEEDINGS.

Chapter I—*Recording of Public Instruments, Oral Wills and Codicils.*

* * * * * * * * * * *

Chapter V—*Judicial Administration of Decedent's Estate.*

Section 556—(23 L.) (1038 S. C. P.) The executor of the last will of a decedent, or in case that none has been appointed, or if the decedent left no validly executed will, the surviving spouse of the decendent or any heirs at law or any person claiming as testamentary heir or legatee, or any unsecured creditor with written title, having a claim against the decedent, may, on a proper petition duly showing therein the necessary facts, apply for a judicial administration of the property of said decedent. Such petition shall be filed

in the district court having jurisdiction over the last residence of the decedent or of the place where the greater part of his property is situated and shall set forth under oath:

(1) The death of the decedent.

(2) The particulars relating to his last will, including the date of the execution thereof and the office in which it was recorded; and in case such decedent shall have died intestate, it shall set forth that according to the best information and belief of the petitioner said decedent left no valid will, with the sources and grounds for such information and belief.

(3) The interest and cause of action of the petitioner.

(4) The names and respective residences of all other persons entitled to inherit in the estate of the decedent.

(5) That decedent left property subject to distribution, and the amount and nature of such property.

Section 558.—(25 L.) (961 S. C. P.) (*As amended by Act of March 8, 1906, page 165.*)—When all or one or more than one of the heirs are absent or have no legal representatives in the jurisdiction of the last place of residence of the decedent, or where the property is located, or when an heir or legatee is a minor or incapacitated and is not represented by his father or mother or by a tutor who has given the bond required by law, the judicial administration of the property of the testator shall be necessary.

Section 559.—(26 L.) (*As amended by Act of March 8, 1906, page 165.*)—It shall be the duty of any executor, in the case last mentioned, to petition the district court of the domicile of the testator, or of the place where his property is situated, for a judicial administration, which said petition shall be accompanied with a certified copy of the will in which the executor is appointed. In default of a duly appointed executor, any one of the persons named in the first section of this chapter may file such petition. Upon the filing of the petition the judge shall proceed to summon the executor, if there be any, the surviving spouse and the other heirs and legatees, as well as all creditors of the estate, di-

recting them to appear at a day, hour, and place designated, not less than eight nor more than fifteen days after the issuance of said summons, but should the said district court be in vacation, the petition shall not be filed until the next session.

* * * * * * * * * * *

Section 563.—(30 L.) Where there is no testamentary trustee, the judge may, pending the appointment of a permanent administrator, appoint a temporary administrator under sufficient bond to take charge of the properties and chattels of the decedent.

In all cases where any of the persons mentioned in section 23 of this act, who having the right to ask the judicial authorization shall bring to the attention of the judge that there exists personal or movable property, capable of being easily removed or concealed, the judge shall direct the marshal to take immediate possession of same, making an inventory thereof, and to deposit ad interim the said property with any responsible party, who may be one of the heirs, until a sufficiently bonded trustee can be appointed by the judge.

* * * * * * * * * * *

Section 567.—(34 L.) The administrator shall immediately take possession of the money and public effects of the decedent and shall place them with the depository designated by the court, taking a receipt therefor. He shall also take charge of the jewelry, furniture, personal effects and gathered crops which he shall keep in a secure place.

Chapter VI—*The Inventory.*

Section 568.—(35 L.) (1064-65 S. C. P.) Within ten days after his appointment the administrator or executor shall proceed to make an inventory of the real and personal property belonging to the estate of the decedent and for that purpose shall give ten days' notice to the heirs and legatees and their legal representatives if they have made their

appearance in the proceeding, the surviving spouse or his or her legal representative, the creditors who are parties thereto, and the special guardian or legal representatives of the minor or incapacitated persons.

* * * * * * * * * *

Chapter VII—*Administration of Decedent's Estate.*

Section 571.—(38 L.) (1016-17 S. C. P.) The administrator shall hold the properties of the decedent and shall endeavor to make them yield the proper rents, products and profits. He may make ordinary repairs to buildings and procure the necessary labor and fertilizers as may be required for the cultivation of rural properties, without requiring authorization therefor.

* * * * * * * * * *

Section 579.—(46 L.) (1030-32 S. C. P.) The administrator shall not sell the inventoried property of the estate, except such as is likely to deteriorate, such as may be difficult and expensive to maintain, crops which can be sold advantageously, and all other properties the sale of which may be necessary for the payment of the debts of the decedent or to meet the expenses of the administration. The court, on the application of the administrator, and after notice to and hearing of the acknowledged heirs, may order the sale of such property at public auction after an appraisement thereof shall have been made by expert appraisers. Public sales shall be made under the same formalties and terms as hereinbefore provided for the making of leases.

* * * * * * * * * *

Chapter IX—*Compensation of Administrators and Executors.*

Section 586.—(53 L.) (1033 S. C. P.) Each administrator and executor, unless the will under which he is appointed provides to the contrary, shall be entitled to be paid from the estate, as compensation for his services, five per centum on sums received in the course of administration, amount-

ing to one thousand dollars or under; two and one-half per centum on sums up to ten thousand dollars, and one per centum on sums above ten thousand dollars. The judge shall also allow an administrator or executor the necessary and proper expenses incurred in administration, including cost of advertising and publishing notices required by law, maintenance and care of the property, legal counsels and traveling expenses.

Chapter X—*Accounting of Administrators and Executors.*

Section 587.—(54 L.) (1010 S. C. P.) Administrators and executors shall file in the district court quarterly statements of the amount received and disbursed by them, verified by their oath accompanied by a voucher showing that the cash balance remaining has been deposited in the banking establishment designated as depository by the court. These statements shall be open for inspection in the clerk's office to any party interested in the estate.

Section 588.—(55 L.) (1012-14 S. C. P.) (As amended by Act of March 8, 1906, page 165.)—Whenever the administrator or executor shall have completed his liquidation of the estate, or resigns, or is removed, or for any reason ceases to be such administrator or executor, he shall file with the court a final account sworn to by him and accompanied by proper receipts and vouchers, which shall likewise be open for inspection. On filing such final account all parties interested in the estate shall be cited to the end that they may attend the final settlement of his account and the return of his bond or cancellation thereof.

Section 589.—(56 L.) (1014 S. C. P.) Eight days after the service of citation to be issued upon the order of the judge of said court, if no objections be filed to such account, if in the opinion of the court the account is just and correct, an order approving the same shall be entered, discharging the administrator from responsibility, and cancelling the bond or other security which he has given. Should objections be filed to the account, the matter shall be brought on

for a hearing and proof taken and the account approved or disapproved as the law and facts may justify.

Section 590.—(57 L.) (1015 S. C. P.) The district court shall make a final order, either approving the account as rendered, or modifying and amending it, and charging the executor or administrator as law may require, and an appeal may be taken from such final order.

* * * * * * * * * * *

Section 592.—(59 L.) The final decree on any accounting shall contain the provision that law and justice require for the distribution of the surplus, in money or property, remaining after the payment of the debts of the decedent and the expenses for the administration among those entitled thereto by law.

* * * * * * * * * * *

Chapter XII—*Acceptance of the Office of Executor or Administrator.*

Section 597.—(64 L.) Every executor who accepts his appointment under a will shall be obliged to file with the officer in whose office the will is recorded a written acceptance thereof, with his oath of office, binding himself to discharge his duties as executor to the best of his ability, and in default thereof he shall be unable to take possession of the property of the decedent. The district court of the last domicile of the decedent or of the place where his property is situated shall, on the filing of a certificate of the notary or other proper officer that such acceptance and oath of office have been filed, issue letters testamentary to the executor, which shall be evidence of his authority. When any administrator has filed his bond and an oath of office, the judge or court that shall have appointed him, shall issue to him letters of administration, over its seal, as evidence of his authority.

* * * * * * * * * * *

[SUB] TITLE II.

First and Only Chapter—Division and Partition of Inheritance.

Section 600.—(67 L.) (As amended by Act of March 8, 1906, page 165.)—Whenever any executor or administrator is in possession of all of the estate, and shall have paid or shall have in hand a sufficient amount for the payment of the debts and expenses of administration, he must apply to the district court for the appointment of a commissioner ("contador partidor") to make such partition and division, in case that decedent did not, by his will, appoint such commissioner.

Section 601.—(68 L.) (As amended by Act of March 8, 1906, page 165.)—All such information as may be necessary for the appraisal, liquidation, division and distribution of the hereditary estate shall be transmitted to such commissioner, whether appointed by the decedent in his will, or by the district court.

Section 602.—(69 L.) (As amended by Act of March 8, 1906, page 165.)—The acceptance by the commissioner of the appointment shall entitle each and every interested party to compel him to perform his functions within a reasonable time, according to the importance and the difficulty of the division; and should he fail or neglect to do so, any party may apply to the judge of the district court for an order directing him to do so.

Section 603.—(70 L.) The commissioner shall fix a day, hour, and place for the division and shall for such purpose notify the parties thereto. At the time and place fixed, and in the presence of the parties, he shall have the power to examine witnesses and experts. He shall submit a statement of the property subject to division, with the value of each item, and in his report, which must be subscribed by him, he shall point out the way and manner in which the property may be justly and equitably divided between those entitled to share in the inheritance or succession, and if in

his opinion, such division can not be made without sale, he shall include that fact in his report and recommend a judicial sale for the purpose of distribution of the proceeds. He shall file his report with the clerk of the court, and any of the parties may file an application for the approval of such report, on eight days' notice to other parties. If, during eight days after notice of the filing of the report, no objections to the report are filed, the judge of the district court shall approve it and make an order for partition, division, or distribution in accordance therewith. If objections are filed to the report, the matter may be brought on for hearing before the court by any party on five days' notice to the others, and the judge, after hearing the parties by their counsel, shall sustain or overrule the objections, confirm the report or set it aside, or send it back for amendment. If the report shall be attacked for bribery, conspiracy, fraud or misconduct in the proceeding, and there appear substantial grounds for the accusation, the judge shall remove the commissioner and direct a copy of the proceedings and of the evidence to be placed in the hands of the fiscal of the district court for the institution of criminal proceedings and set aside the report and appoint another commissioner to make a new partition.

Section 604.—(71 L.) (As amended by Act of March 8, 1906, page 165.)—When the partition has been definitely approved, each of the interested parties shall be entitled to a certified copy of the final order of partition, which shall contain all of the requisites necessary for inscription in the registry of property; such documents declaring titles that may be recorded. When the final order is made, the heirs shall be placed in possession of the shares which have been respectively allotted to them; *Provided*, That where the heirs, being all of legal age, shall have informed the court that they are agreed as to the partition of the hereditary estate, the preceding provisions of this title shall not be applicable, and such heirs shall immediately be placed in possession of the hereditary estate by the executor or ad-

ministrator having the possession of the estate. Where there are one or more minor heirs, or heirs otherwise incapacitated, and the legal representatives of the same and of the other heirs are agreed in respect to the partition of the hereditary estate, the provisions of sections sixty-seven to seventy, both inclusive, of this act, shall have no application: *Provided*, That all interested parties shall file with the court a statement of such partition of the hereditary estate as may have been made. The district court shall approve such partition, making therein such legal modifications as the court may deem advisable; against such modifications as the court may make in said partition, any or all of the interested parties not in conformity therewith may take an appeal to the Supreme Court, and said appeal shall be prosecuted in accordance with the provisions of the Code of Civil Procedure.

* * * * * * * * * *

Section 619.—(85 L.) This Act shall take effect from and after its passage, and all previous laws in conflict herewith are hereby repealed; but the special proceedings established in the Civil Code, in the mortgage law and its regulations, and in any other law, in so far as not provided for by this Act, remain in force.

* * * * * * * * * *

AN ACT *Authorizing Writs of Certiorari*, approved March 10, 1904 (Laws of P. R. 1904, pp. 132-133).

Section 670.—(1 L.)—(*Definition.*)—A writ issued by a superior to an inferior court requiring the latter to send to former a certified copy of some proceeding therein pending, or the record and proceedings in some cause already terminated in cases where procedure is not according to the course of the law, and to complete the proceedings when the lower court refuses to do so upon erroneous grounds.

Section 671.—(2 L.)—The Supreme Court and the respective district courts of Porto Rico are hereby authorized and empowered to issue writs of certiorari.

Section 672.—(3 L.)—All writs of certiorari issued by any court, pursuant to the provisions of this Act, shall be under the seal of the court issuing same, and all such writs shall be applied for in the same manner and form as writs of habeas corpus.

Section 673.—(4 L.)—All laws or parts of laws, in conflict with this Act, are hereby repealed.

Section 674.—(5 L.)—This Act shall take effect from and after its passage.

APPENDIX B.

Extracts From the Civil Code of Puerto Rico, Edition of 1930.

BOOK THIRD.

DIFFERENT WAYS OF ACQUIRING OWNERSHIP.

* * * * * * * * * *

TITLE III—SUCCESSIONS.

* * * * * * * * * *

Chapter II—*Inheritances.*

* * * * * * * * * *

Article Eleventh—Executors.

Section 814.—A testator may appoint one or more executors.

Section 815.—No one without the capacity to enter into a contract can be an executor (*albacea*).

A minor cannot be an executor even with the authorization of his father or of his guardian.

Section 816.—Executors may be universal or special.

In any case executors may be appointed either severally, successively, or jointly.

Section 817.—Should the executors be appointed severally, only those acts performed by all of them together, or by one of them legally authorized by the others, shall be valid; and, in case of disagreement, when the act has been agreed to by the majority.

Section 818.—In cases of extreme urgency, one of the several executors may, under his personal liability, perform the acts which may be necessary, giving notice thereof immediately to the others.

Section 819.—If the testator should not clearly establish the appointment of joint executors nor determine the order in which they are to discharge their duties, it shall be understood that they have been appointed severally, and

they shall discharge their duties in the manner prescribed in the two foregoing sections.

Section 820.—Executorship is a voluntary office, and it shall be understood as accepted by the person appointed thereto should he not excuse himself within six days following that on which he has received notice of his appointment, or if he was already aware thereof, during the six days following that on which he had knowledge of the death of the testator.

Section 821.—An executor who accepts his office is bound to act; but he may renounce it, alleging a cause which is sufficient in the sound discretion of the district court.

Section 822.—The executor who does not accept the office, or renounces it without sufficient cause, shall lose what the testator may have left him, excepting always his right to the legal portion.

Section 823.—Executors of wills shall have all the powers expressly conferred upon them by the testator and which are not contrary to law.

Section 824.—Should the testator not have specially determined the powers of the executors they shall have the following:

1. To dispose and pay the suffrages, and funeral expenses of the testator in accordance with the provisions made by him in his will and, in their absence, according to the customs of the town.

2. To pay, with the knowledge and consent of the heir, the cash legacies.

3. To carefully see to the execution of the other provisions of the will and maintain, when just, its validity in and out of court.

4. To take the necessary precautions for the preservation and custody of the property, with the intervention of the heirs who may be present.

Section 825.—Should there not be in the estate cash enough for the payment of the funeral expenses and legacies, and the heirs should not contribute from their own funds thereto, the executors shall sell the personal prop-

erty; and should the proceeds therefrom not be sufficient, the real property shall be sold, with the intervention of the heirs.

If a minor, absentee, corporation, or public institution should have any interest in the estate, the sale of the property shall take place with the formalities prescribed by law for such cases.

Section 826.—The executor for whom the testator has not fixed a term must fulfill his office within a year, counted from his acceptance or from the conclusion of the litigation which may have been instituted with regard to the validity or nullity of the will or of any one of its provisions.

Section 827.—Should the testator desire to extend the legal term, he must expressly fix the time of the extension. Should he not have fixed it, it shall be understood that the term is extended for one year.

If after the expiration of this extension the will of the testator should not yet have been complied with, the district court may grant another term for the time which may be necessary, in view of the circumstances of the case.

Section 828.—The heirs and legatees may, by common consent, extend the term of the executorship for the time they may consider necessary, but if the agreement is only that of a majority the extension cannot exceed one year.

Section 829.—The executors shall submit an account of their administration to the heirs.

Should they have been appointed, not in order to deliver the property to determined heirs, but to invest or distribute the same in the manner ordered by the testator, in the cases allowed by law, they shall submit their accounts to the district court having jurisdiction.

Any provision of the testator in contravention of this section shall be void.

Section 830.—Executorship is a gratuitous office. The testator, nevertheless, may assign the executors the remuneration he may consider proper; all without prejudice to the right they may have to collect what may be proper

for their work in the division, or for any other professional services.

If the testator bequeaths or designates jointly any remuneration for the executors, the shares of those who do not accept the office shall accrue to those who may discharge it.

Section 831.—An executor can not delegate the office unless he has express authority therefor from the testator.

Section 832.—Executorship terminates by the death, incapacity, renunciation, or removal of the executor, and by the lapse of the term fixed by the testator, by law, and, in a proper case, by the persons interested.

Section 833.—In the cases of the foregoing section, and in case the executor has not accepted the office, the execution of the will of the testator shall devolve upon the heirs.

* * * * * * * * * *

Chapter VI—*Provisions Common to Inheritance by or Without Will.*

* * * * * * * * * *

Article Fifth—Benefit of inventory and right to deliberate.

Section 964.—Every heir may accept an inheritance under benefit of inventory, even though the testator should have forbidden it.

He may also request the making of the inventory before accepting or repudiating the inheritance, in order to deliberate on this point.

Section 965.—The acceptance of the inheritance, under the benefit of inventory, may be made before a notary or in a writing before the district court having jurisdiction in testamentary or intestate proceedings.

Section 966.—Should the heir referred to in the preceding section be abroad, he may make said declaration before a diplomatic or consular agent of the United States, who may be authorized to discharge the duties of a notary in the place of the execution.

Section 967.—The declaration referred to in the preceding sections shall not produce any effect whatsoever unless it be preceded or followed by a true and exact inventory of

all the property of the estate, made with the formalities and within the periods fixed in the following sections.

Section 968.—An heir who may have in his possession the property of the estate or a part thereof, and who may wish to make use of the benefit of inventory or of the right to deliberate, shall state this to the district court of competent jurisdiction in testamentary or intestate proceedings, within ten days following that on which he has become aware that he is such an heir, if he resides in the place where the deceased may have died. If he resides outside of it the period shall be thirty days.

In either case the heir must request, at the same time, the making of the inventory and the citation of the creditors and legatees in order that they may be present thereat if they wish to.

Section 969.—If the heir should not have in his possession the inheritance or a part of it, or has not taken any steps as such heir, the periods fixed in the preceding section shall be counted from the day following that on which the period fixed by the district court for accepting or repudiating the inheritance expires, in accordance with section 959, or from the day on which he may have accepted it or has acted as heir.

Section 970.—With the exception of the cases referred to in the two preceding sections, if no action should have been brought against the heir, he may accept, under the benefit of inventory, or with the right to deliberate while the action to claim the inheritance does not prescribe.

Section 971.—An inventory shall be begun within the thirty days following the citation of the creditors and legatees and shall be finished within sixty days more.

If, by reason of the property being situated at a long distance, or being very valuable, or for any other sufficient cause, said sixty days should appear insufficient, the district court may extend this period for such a time as it may deem necessary, which can not exceed one year.

Section 972.—If by the fault or negligence of the heir the inventory is not begun or finished within the periods, and

with the formalities prescribed in the preceding sections, it shall be understood that he accepts the inheritance purely and simply.

Section 973.—An heir, who should have reserved to himself the right to deliberate, must state to the court having jurisdiction, within thirty days, counted from the day following that on which the inventory has been concluded, whether he accepts or repudiates the inheritance.

If said thirty days have elapsed without said statement being made it shall be understood that he accepts it purely and simply.

Section 974.—In every case the district court may provide on the petition of the interested party during the formation of the inventory until the acceptance of the inheritance, for the administration and custody of the estate, for that purpose, an administrator with the necessary legal capacity who shall present a bond to be fixed by the court.

Section 975.—A person who judicially claims an inheritance, which another has had in his possession for more than one year and who should win the suit, shall not be obliged to make an inventory in order to enjoy said benefit, and he shall be liable for the charges on the estate only with the property which may have been delivered to him.

Section 976.—The inventory made by the heir, who afterwards repudiates the inheritance, shall benefit the substitutes and the intestate heirs, with regard to whom the thirty days for deliberation and in which to make the statement prescribed by section 973 shall be counted from the day following that on which they received notice of the repudiation.

Section 977.—The benefit of inventory produces the following affects in favor of the heir:

1. The heir shall not be bound to pay the debts and other charges on the inheritance except in so far as the property of the same may go.

2. He retains against the estate all the rights and actions which he may have had against the deceased.

3. His private property shall not be confused for any purpose whatsoever, to his injury, with the property belonging to the estate.

Section 978.—The heir shall lose the benefit of inventory:

1. If having knowledge thereof he fails to include in the inventory any of the property, rights, or actions of the inheritance.

2. If before concluding the liquidation of the debts and legacies he should alienate any property of the estate without judicial authorization, or that of all the persons interested, or if he should not apply the value of what is sold in the manner specified at the time the authorization was granted him.

Section 979.—During the making of the inventory and the period granted for deliberating the legatees can not demand the payment of their legacies.

Section 980.—Until all the known creditors and the legatees have been paid, it shall be understood that the estate is under administration.

The administrator, whether it be the heir himself or any other person, shall have, as such, the representation of the estate to exercise all the actions pertaining thereto, and answer all complaints instituted against the same.

Section 981.—The administrator can not pay the legacies until he had paid all the creditors.

Section 982.—Should there be a pending suit among the creditors with regard to the preference of their credits, they shall be paid in the order and according to the degree fixed by the final judgment of graduation.

Should no suit be pending among the creditors, those presenting themselves first shall be paid first; but should it appear that one of the known credits is preferred, the payment shall not be made without previous security being given in favor of the creditor having a better right.

Section 983.—If after the legacies are paid other creditors should appear, the latter shall have a right to make claims against the legatees only in case sufficient property should not remain to pay them.

Section 984.—If for the payment of credits and legacies the sale of the hereditary estate should be necessary, it shall take place in the manner established by the law of civil procedure with regard to intestate and testamentary proceedings, unless all the heirs, creditors, and legatees come to a different agreement.

Section 985.—If the hereditary estate should not be sufficient for the payment of the debts and legacies, the administrator shall render an account of his administration to the creditors and legatees who have not been paid in full, and he shall be liable for the damages caused the estate through his fault or negligence.

Section 986.—After the creditors and legatees are paid, the heirs shall have the full enjoyment of the remainder of the estate.

Should the estate have been administered by another person, he shall give an account of his administration to the heir, under the liability imposed by the preceding section.

Section 987.—The cost of the inventory and the other expenses arising from the administration of the inheritance, accepted under the benefit of inventory, and the defense of its rights, shall be charged to the said estate. The costs which the heir may have been personally adjudged to pay by reason of his deceit or bad faith are excepted.

The same shall be understood with regard to the costs arising from making use of the right to deliberate, if the heir repudiates the inheritance.

Section 988.—The private creditors of the heir can not interfere with the operations of the estate, accepted by the latter under benefit of inventory, until the creditors of the same and the legatees have been paid; but they may demand the retention of the attachment of the remainder which may be left the heir.

FILED
MAR 30 1946
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1945.

No. 908.

MARIO MERCADO RIERA, *et al.*,
Petitioners,

v.

ADRIAN and MARÍA-LUISA MERCADO RIERA DE BELAVAL,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

JOSÉ A. POVENTUD,
Attorney for Respondent,
Adrián Mercado Riera.

CELESTINO IRIARTE,
F. FERNÁNDEZ CUYAR,
H. GONZÁLEZ BLANES,
Attorneys for Respondent,
María-Luisa Mercado Riera.

THE REPORTER COMPANY, Inc., Walton, N. Y.
1946

Index.

Page

Introductory 2
Opinions below 2
Lack of Jurisdiction on Certiorari here 3, 91-109
Statement of the three cases involved 3-13

Certiorari No. 1517 (insular Supreme Court) .. 13-22, 36
Certiorari No. 1516 (local Supreme Court) 22-26, 36
Certiorari No. 1518 (Supreme Court of Puerto Rico) 26-28, 36
The various and separate judicial proceedings concerning decedent's estate 29-39

(1) Probate of testator's holographic will 30

(2) Application for letters testamentary 30

(3) Qualification by ex-commissioner for partition 31

(4) Case #1213, for acceptance of inheritance by one heir on benefit of, and for order to prepare, inventory of assets and liabilities 31

(5) Proceeding for settlement of final accounts rendered by petitioner Mario Mercado Riera up to March 4, 1940 33

(6) Proceeding for surrender of the estate to the heirs or co-owners, which originated Certiorari No. 1517 (local Supreme Court) 36

(7) Claim for alleged fees by attorneys Ochoteco and Zapater, which gave rise to Certiorari No. 1516 (P. R. Supreme Court) 36

(8) Petition to sell certain properties of the estate for alleged purpose of partially paying some legacies, which cause the Certiorari Case No. 1518 (insular Supreme Court) 36

Page

(9) New proceeding for purported approval of a so-called report by ex-commissioner for partition (Porrata), petitioner herein 36

Argument 40

I. The Supreme Court of Puerto Rico had complete jurisdiction on certiorari to the District Court of Ponce in cases #1516, #1517 and #1518 (Petitioners' brief, Point I, pp. 22-33) 40

A. Insular Supreme Court's unrestricted power to construe and modify decisions on local laws 40

B. Organic Acts did not, by adoption, convert local statutes into federal laws 43

C. The local Certiorari Act (1904) confers broad jurisdiction and discretionary powers 43

II. Petitioner Porrata, as intervenor in Certiorari #1517, lacks the necessary reviewable interest. However, there was never absence of due process below (Petitioners' brief, Point III, pp. 39-61) 47

III. No federal question was properly raised in, or ever passed upon by, the insular Supreme Court below. Hence, none should be reviewed here. Yet, petitioners were amply heard (Petitioners' brief, Points I, III) 54

IV. The insular Supreme Court had jurisdiction on certiorari to review proceedings in Nos. 1516, 1517 and 1518, and to affirm or vacate and grant appropriate relief (Petitioners' brief, Point II, pp. 33-39) 59

V. Concise response to some other minor questions of local law 62

Page

A. The Ponce District Court overreached its powers in holding that decedent's estate was in custodia legis "without any judicial administration having been decreed" 62

B. District Courts in Puerto Rico are not divided into probate and civil sides 65

C. Meaning of "perfecting" (formalizar) the so-called "draft of partition," within the compromise agreement 65

D. Time allowed Porrata to present a partition deed under the compromise agreement 66

E. Adjudication of residuary estate by heirs, precludes, any partitioner's further intervention under local law 72

F. The doctrine of estoppel cannot be invoked by petitioners 73

VI. As a matter of local law, (A) the insular Supreme Court correctly and reasonably held that the executorship expired on September 1, 1939; and that (B) no judicial administration of decedent's estate had been sought or decreed (Petitioners' brief, Point IV, pp. 62-76) 76

A. The executorship legally expired on September 1, 1939 76

B. No judicial administration of decedent's estate had ever been sought or decreed. None can arise in Puerto Rico by estoppel or implication 82

Page

C. The decision of the insular Supreme Court, affirmed by the Court of Appeals, even if reviewable here, should not be disturbed as it wholly deals with local law 87

Conclusion 89

Appendices 91-116

Appendix A: Respondents' motion for dismissal of petition for certiorari 91

A. Certiorari not applied for within three months after entry of judgment below 91

B. Reasons in Court's opinions are not reviewable 92

C. The judgments of the insular Supreme Court which were affirmed by the Court of Appeals, rested on adequate non-federal grounds 94

D. Lack of adequate or valid reasons for allowance of certiorari herein (Rule 38(5) of this Court) 95

E. Petitioners' want of litigable interest. Moot character of questions presented 101

Sub-Appendix A-I: Affidavit by Salvador S. Mandry, Esq. 110

Sub-Appendix A-II: Certificate by the Secretary-Reporter of the insular Supreme Court 114

TABLE OF CASES.

	Page
Abadie v. U. S., 149 U. S. 261, 37 L. ed. 726	54
Adler v. Seaman, 266 Fed. Rep. 828	55
Allen-Bradley Local v. Wisconsin, etc., 86 L. ed. 1154, 1163	45
Alvarado v. Sucn. Oritz, et al., 15 D. P. R. 137, 140	77
Aponte & Sobrino v. Heirs of Perez, 48 P. R. R. 437, 441-442	5, 29, 83
Backus v. Fort St. Union Deport Co., 42 L. ed. 853, 860	42
Baetjer v. U. S., 143 F. 2d 392, 397	59, 74, 84
Ballester-Ripoll v. Court of Tax Appeals of Puerto Rico, 142 F. 2d 11, 17	42
Ballester v. Tribunal de Apelaciones, 61 D. P. R. 475, 512 (Spanish edition)	60
Barceloux v. Buffen, 51 F. 2d 82, 85	45
Bell Tel. Co. of Pa. v. Van Dyke, 80 L. ed. 379, 380	95
Bennet v. Kiber, 76 Tex. 385	55
Board, etc., v. State Bd., 1 Cal. 2d 784, 37 P. 2d 84	61
Boerman v. Heirs of Boerman, 52 P. R. R. 593	29
Bonet v. Texas Co. (P. R.), 84 L. ed. 405	88, 100
Bonet v. Yabucoa Sugar Co. (P. R.), 83 L. ed. 949	88, 100
Boston Tow Boat Co. v. U. S., 88 L. ed. 975, 977, 321 U. S. 632	53
Brewer v. Browning, 115 Miss. 358, L.R.A. 1918F 1185	42
Buscaglia v. District Court, etc. (C. C. A., 1st Cir.), 145 F. 2d 275, 282	21, 61
Cameron v. U. S., 36 L. ed. 1077, 1078	54
Carreras v. Brunet, 47 P. R. R. 420	55
Certain, etc., Corp. v. Wallinger, 89 F. 2d 427, 429	51, 94

Page

Chesapeake, etc., v. Manning, 46 L. ed. 1114, 1146 61
Chiesa v. Life Ins. Co., 169 Fed. Rep. 509 (cert. den. 54 L. ed. 344) 109
Cibes v. Santos, 22 P. R. R. 208 5
Clark v. Gray, 83 L. ed. 1001 92
Coe v. Armour Fertilizer Works, 59 L. ed. 1027, 1032 56, 97, 99
Cole v. Ralph, 64 L. ed. 567, 574 60
Coll v. Rigo, 16 P. R. R. 562 65
Comas v. Court, 39 P. R. R. 689, 691 16, 45
Copperweild Steel Co. v. Industrial Com., 89 L. ed. (Adv. Ops., 928, 930) 95
Crehore v. The Registrar, 22 P. R. R. 30, 33 5, 83
Cuesta v. Treasurer, 54 P. R. R. 82, 84 42

DeCastro v. Bd. of Comm'rs, 136 F. 2d 419, 425 (affd. 88 L. ed., 1384) 21, 61, 89, 100
De la Torre v. Nat. City Bank, 110 F. 2d 976, 983 (cert. den. 85 L. ed. 428) 21
Devine v. Zimmerman, 133 F. 2d 850, 852 39
Dexter v. District Judge, 13 P. R. R. 340 29, 85
Díaz v. Court, 49 P. R. R. 732 bot. 29
Díaz v. Lugo, 67 L. ed. 550, 552 61, 87, 99, 100

Emanuelli v. Court, 49 P. R. R. 756, 758 16, 45
Emerson v. Slater, 16 L. ed. 360 69
Ex parte Sotomayor, 24 P. R. R. 172 14, 39,73, 86
Ex parte Suau, 27 P. R. R. 890 5, 29, 83, 86
Ex parte Vega, 28 P. R. R. 361 29, 86

Fed. Land Bank of Baltimore v. Court, 45 P. R. R. 201 55
Fernandez v. Avellanet, 16 P. R. R. 61 20, 39
Fleming v. Fleming, 68 L. ed. 547, 549 42, 58
Flores v. Llompart, 50 P. R. R. 641, 645 mid. 15, 98

Page

Flournoy v. Wiener, 88 L. ed. 709 95
Franceschi v. Court, 45 P. R. R. 646 ..... 16, 45

Galbreath v. Trust Co., 134 F. 2d 569 ..... 20, 39
Glass Works, Inc., v. Keegan, 43 F. Supp. 153, 159 19
Goldstein v. Behrends, 123 Fed. Rep. 399 109
Gulf Ref. Co. v. U. S., 70 L. ed. 196 61

Hamilton Trust Co. v. Mines Co., 223 Fed. Rep. 494 (cert. den. 60 L. ed. 482) 104
Harding v. Nat. Bank, 31 F. 2d 914 ..... 26, 102
Heirs of Pellicia v. Dist. Court, 36 P. R. R. 588, 590 ..... 5, 14, 15, 30, 45, 73, 83, 98
Helvering v. Minn. Tea Co., 80 L. ed. 284 ..... 52, 74
Helvering v. Tex. Penn Oil Co., 81 L. ed. 755 ..... 52, 74
Herb v. Pitcairn, 89 L. ed. (Adv. Ops. 481, 486) 51, 94, 95
Hijos v. Commins, 88 L. ed. 1396 ..... 21, 89, 100
Holey v. Lawrence, 87 L. ed. 434 95
Hubbard v. Art Museum, 196 Fed. Rep. 871, 874 109

In re Kane, 48 F. 2d 97, 98 102
In re Michigan-Ohio Bldg. Corp., 117 F. 2d 191, 193 104
In re Schwartz, 89 F. 2d 172, 173 ..... 26, 102
Ins. Co. v. Bridge Co., 37 F. 2d 695 19
Irizarry v. Registrar, 22 P. R. R. 88 ..... 14, 39, 73

Kammerer v. Kroeger, 81 L. ed. 254, 255 58
King v. Fernandez, 30 P. R. R. 588 55

Labarthe v. Neuman, 23 P. R. R. 640 29
Leaver v. K. & L. etc. Co., 6 F. 2d 55
Lisman v. Trust Co., 211 Fed. Rep. 413, 417 109
Longest v. Langfort, 72 L. ed. 473 104
Lopez v. Court, 40 P. R. R. 478, 480 ..... 16, 45

Page

Magnum Import Co. v. Coty, 262 U. S. 159, 67 L. ed. 922 101
Martinez v. Sancho (P. R.), 108 F. 2d 960, 961 58
Marvez v. Court, 48 P. R. R. 152, 155 mid. 29
Matos v. Hnos (P. R.), 81 L. ed. 728 ..... 21, 45, 88
Mauro v. Rodríguez (P. R.), 135 F. 2d 555 ..... 52, 74
McFaddin Rice Milling Co. v. Maldonado, 31 P. R. R. 450, 456 69
McGhee v. Leitner, 41 F. Supp. 674, 675 ..... 51 94
McGoldrick v. Gulf Oil Corp., 84 L. ed. 536 95
McNutt v. Corp., 80 L. ed. 1135 92
Meier Dental Mfg. Co. v. Smith, 237 Fed. Rep. 568 69
Mendez v. Court, 50 P. R. R. 671, 674 ..... 16, 45
Mendez v. Soto Nussa, 13 P. R. R. 366 ..... 16, 45
Mercado v. Corte, 62 D. P. R. 368, 391 (Spanish edition) 2, 3, 7, 30, 60, 65
Mercado Riera v. Mercado Riera, 152 F. 2d 86 ..... 7, 45, 53, 81, 93, 94
Mercelis v. Wilson, 59 L. ed. 370, 371 39
Miller v. Perytes, 71 F. 2d 804, 807 ..... 20, 39
Moore v. Dist. Court, 59 P. R. R. 618 46

Nadeau v. Conn, 142 Wash. 242, 252 P. 913 42
National Surety Co. v. Rossy, 19 P. R. R. 897 59
New England, etc., Co. v. Gay, 145 U. S. 123, 130, 36 L. ed. 646, 648 54
Nuñez v. Soto Nussa, 14 P. R. R. 190, 192 .... 16, 44, 45

Olsen v. Jacklowitz, 74 F. 2d 718 26
Opelika City v. Daniel, 109 U. S. 108, 27 L. ed. 873 54
Oronoz v. Román, 26 P. R. R. 22, 26 65
Ortega v. Lara (P. R.), 50 L. ed. 1055, 1056, 1057 41, 43
Ortíz v. Court, 53 P. R. R. 38 ..... 16, 45
Owen v. Giles, 157 Fed. Rep. 825, 829 69

Page

Padilla v. Justice of Peace, 35 P. R. R. 276, 282 60
Patterson v. Gas Co., 83 L. ed. 231, 233 ..... 58, 92
People of P. R. v. Termanos (P. R.), 84 L. ed. 916, 918 43
Perez v. Perez, 41 P. R. R. 844, 845 ..... 5, 29, 83
Piacentini v. Buscaglia, 59 D. P. R. 782 (Spanish edition) 66
Pitcairn v. Fisher, 78 F. 2d 649, 651 39
Pol v. Court, 48 P. R. R. 367, 371 ..... 16, 45
Ponce v. Roman, etc., Church (P. R., 52 L. ed. 1068, 1074 ..... 41, 43
Porrata v. District Court, 53 P. R. R. 140-148 .. 6, 31, 48, 83
Power Co. v. Co., 65 F. 2d 298, 302 39
President, etc., v. Merritt, 59 Fed. 6 ..... 20, 39
Puerto Rico v. Rubert Hermanos, 86 L. ed. 1081, 1088 ..... 21, 45, 61, 88, 100
Puerto Rico v. Shell Co., 82 L. ed. 236, 243 43

Quinn v. U. S., 58 F. 2d 19, 20 mid. 19

Radio Corp. v. Chicago Bears F. Club, 97 F. 2d 223, 224 109
Remington Paper Co. v. Watson, 43 L. ed. 762, 765 58
Revilla v. Court, 39 P. R. R. 57, 63 mid. 20, 39
Richardson, etc. v. Scott, 72 L. ed. 497 19
Riviere Trustee v. Dist. Court, 60 D. P. R. 732 (Spanish edition) 46
Rodríguez v. Arocho, 62 D. P. R. 700 (Spanish edition) 15, 98
Rodríguez v. Dist. Court, 69 D. P. R. 919 (Spanish edition) 46
Rodríguez v. The San Juan Fruit Co., 60 D. P. R. 437 (Spanish edition) 63, 74
Rundle v. Cutting, 18 Colo. 337, 32 P. 994 70

Page

Sabater v. Escudero, 23 P. R. R. 794 ..... 29, 85
Sage Stores Co. v. Kansas, 89 L. ed. (Adv. Op. 22, 23) 45
Sanchez v. Calderon, 19 P. R. R. 1043, 1046 29
Sanchez v. Cuevas Zequeira, 23 P. R. R. 47 .. 15, 44, 45
Sancho v. Texas (P. R.), 84 L. ed. 401 21
Santana v. Court, 55 P. R. R. 419, 421 ..... 16, 45, 60
Saunders v. Shaw, 61 L. ed. 1163 ..... 55, 97, 99
Schram v. Poole, 97 F. 2d 566, 570 45
Smith v. Collins, 165 Fed. Rep. 148 70
South Bell Tel. Co. v. Oklahoma, 82 L. ed. 752, 755 ..... 56, 91, 95
Sporting Club v. Foote, 31 P. R. R. 154, 163 ..... 16, 45
Stewart v. Kansas City, 60 L. ed. 120 58
Succ'n de Jesús v. Corte, 65 D. P. R. (Spanish), p. 3 ..... 29, 86
Succ'n of Kelly, 102 So. 678, 157 La. 585 65
Succ'n of Tristani v. Colón (P. R.), 71 F. 2d 374 ..... 42, 58
Supreme Forest, etc., v. City of Belton, 100 F. 2d 655 ..... 52, 74

Talbot v. Mason, 125 Fed. Rep. 101 109
The Juncos Central Co. v. Rodríguez, 16 P. R. R. 286, 292 ..... 63, 74
Thompson v. Deal, 49 F. Supp. 366, 369 ..... 20, 39
Torres v. Bank, 110 F. 2d 381, 383 21
Trust Co. v. Jones, 16 F. 2d 236, 239 ..... 20, 39

U. S. v. Collins, 55 F. 2d 70, 72 bot. 19
U. S. ex rel. Holsezndorff v. Hay, 48 L. ed. 1025, 1026 95
U. S. v. Pate, 47 F. Supp. 965, 968 ..... 20, 39
U. S. v. Texas, 86 L. ed. 356, 362 45

Page

Vicens v. Cruz, 20 P. R. R. 179, 181 ..... 29, 85
Vidal v. South Am. Securities Co., 276 Fed. Rep. 857, 874 108

Waialua Agricultural Co. v. Christian, 83 L. ed. 61, 72 43
Wayne United Gas Co. v. Owens Illinois etc. Co., 81 L. ed. 557, 561 92
Wolsey v. Best, 81 L. ed. 3, 4 95
Wright v. Gibson, 128 F. 2d 865 94
W. Va. State Bd. of Educ. v. Barnette, 87 L. ed. 1628 42

OTHER AUTHORITIES.

Clemente de Diego, Comentarios al Código Civil (Spanish text):
Vol. 3, p. 259 5

Corpus Juris:
Vol. 1, Sec. 48, p. 952 101
Vol. 49, p. 130 (Pleadings) 63, 74

Corpus Juris Secundum:
Vol. 1, Sec. 10, p. 993 101
Vol. 2, p. 1151, Sec. 71 (Agency) 70
Vol. 4, pp. 170, 171, Sec. 80 (App. & E.) 54
Enciclopedia Jurídica Española (Spanish text):
Vol. XVI, p. 502 66
Galindo y Escosura, Comentarios a la Legislación Hipotecaria (Spanish text):
Vol. 2, pp. 257-258 ..... 14, 29, 73
Judgments of the Supreme Court of Spain (Spanish text):
January 23, 1935 6

Page

February 5, 1908 6
February 24, 1927 (173 Jurisprudencia Civil, p. 699) 6
February 22, 1929 (187 Jurisprudencia Civil, p. 807) 6
November 13, 1903 (Decision of the Registries) 6
November 24, 1906 (105 Jurisprudencia Civil, pp. 812, 819) 4, 77

Jurisprudencia Civil:
Vol. 96, pp. 599, 601, 602 ..... 6, 77, 80
Vol. 173, p. 699 6
Vol. 187, p. 807 6

Manresa, Comentarios al Código Civil (Spanish text):
Vol. 6 (3rd edition), pp. 749-750, 751 5
Vol. 6 (1932 edition), pp. 736, 753 ..... 4, 77, 79
Vol. 7 (3rd edition), pp. 480, 489 86
Vol. 11 (1905 edition), pp. 453, 454 70

Maura, Dictámenes (Legal Opinions—Spanish text):
Vol. 4, pp. 308, 309, 351 ..... 4, 77

New Velázquez Dictionary, 1st ed., Spanish-English, p. 326 66

6 Sanchez Román, Comentarios al Código Civil (Spanish text):
Vol. 2, p. 1450 ..... 4, 77
Vol. 2, p. 1453 ..... 6, 71
Vol. 3, pp. 1984-1985 72

STATUTES.

Federal:

Organic Act for Puerto Rico (Jones Act, 1917):
Sec. 9 66
Sec. 40 (48 U. S. C. A., Sec. 861) 40 57
Sec. 57 ..... 41, 43

Page

Organic Act for Puerto Rico (Foraker Act, 1900):
Sec. 8 ..... 40, 43
Sec. 15 43
Sec. 33 ..... 41, 43, 58
Organic Act for Hawaii (1900):
Sec. 6 (48 U. S. C. A., Sec. 496) 42
Sec. 81 (48 U. S. C. A. 631) 42
Rule 38(5), U. S. Sup. Ct. 95, 97
Rule 32, C. C. A., 1st Cir. 91
U. S. C. A., Title 28, Sec. 350 91

Puerto Rican:

Civil Code (1930 edition), Sections:
603 72
610 72
639-643 30
824 ..... 5, 26, 49, 83, 84
825 ..... 26, 49, 84
826 and 827 ..... 4, 31, 64, 77, 82
828 ..... 30, 77, 78
829 ..... 31, 33
832 and 833 ..... 5, 13, 64, 75, 77, 79, 90
964 to 988 ..... 31, 48
968, par. 2 31
971 31
974 32
1605 70
1610 70
1611 80
1624 80

Page

Code of Civil Procedure (ed. 1933), Sections:

72 ..... 14, 48, 55, 97
556 ..... 17, 29, 31, 85, 87
558 ..... 84, 85
597 ..... 30, 31
604 ..... 14, 39, 73
670 (Certiorari Act of 1904) 16, 42, 43, 44, 60

Inheritance Tax Act of 1925, No. 99:

Sec. 5 (Laws 1925, p. 795, as amended by Act # 34, July 22, 1935, Extra Session Laws 1935, p. 423) 68
Sec. 9 (as amended April 27, 1933, Laws of 1933, p. 234) 68

Special Legal Proceedings Act:

Sec. 23 ..... 17, 85
Sec. 25 ..... 84, 85

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 908.

MARIO MERCADO RIERA, Executor, Petitioner, v. MARÍA-LUISA MERCADO RIERA DE BELAVAL and ADRIÁN MERCADO RIERA, Respondents.	No. 1517. Supreme Court of Puerto Rico No. 3960. C.C.A., 1st.
PEDRO M. PORRATA, Commissioner, Petitioner, v. MARÍA-LUISA MERCADO RIERA DE BELAVAL and ADRIÁN MERCADO RIERA, Respondents.	No. 1517. Supreme Court of Puerto Rico No. 3960. C.C.A., 1st.
MARIO MERCADO RIERA, Executor, Petitioner, v. MARÍA-LUISA MERCADO RIERA DE BELAVAL and ADRIÁN MERCADO RIERA, Respondents.	No. 1516. Supreme Court of Puerto Rico No. 3960. C.C.A., 1st.
MARIO MERCADO RIERA, Executor, Petitioner, v. MARÍA-LUISA MERCADO RIERA DE BELAVAL and ADRIÁN MERCADO RIERA, Respondents.	No. 1518. Supreme Court of Puerto Rico No. 3960. C.C.A., 1st.

BRIEF FOR RESPONDENTS.

Introductory.

The several four above-entitled cases, consolidated only for the purposes of hearing in the Court of Appeals, present questions of purely local law of Spanish origin, correctly decided without dissent, by the Supreme Court of Puerto Rico (R. 97-121) and the Court of Appeals (R. 912-933). The insular Supreme Court emphasizes that: "The fundamental question which is the gist of the whole controversy is whether or not the executorship in the present case has terminated by virtue of the expiration of the period which the testator and the law allowed the executor, or whether the heirs, by their acts in accordance with the compromise contract, could extend said period" (R. 110 top).

The Court of Appeals did not find any erroneous ruling below; but, on the other hand, it stated that "it would seem to be patently correct" (R. 930 mid.; 152 F. 2d 96; col. 2 top).

Opinions Below.

The local Supreme Court's opinion, delivered on July 14, 1943, is reported in *Mercado v. Corte,* 62 D. P. R. 368-391, Spanish edition. The English edition has not yet appeared. An English translation of the opinion of the Puerto Rican Supreme Court is part of the printed record (R. 97-121). Petitioners attempted to appeal to the Court of Appeals (R. 24, 123, 126, 182), from three separate and different judgments (R. 24, 121, 181). Their affirmance by the Circuit Court of Appeals for the First Circuit is reported in *Mercado Riera v. Mercado Riera* (Nov. 23, 1945), 152 F. 2d 86.

Jurisdiction.

Respondents contend that according to their motion for dismissal (Appendix A) of the petition for certiorari, there is no ground on which the reviewing power of the United States Supreme Court may be invoked.

Respondents append hereto their motion to dismiss the petition herein, so that the facts essential to an adequate appreciation of the situation in this purely private litigation, may be brought to the Court's attention without interruption.

Statement of the Three Cases Involved.

A proper understanding of the questions presented, requires the facts and the various independent proceedings involved, to be stated with some detail. This is specially so, in view of petitioners' inaccurate and confusing statement of the case.

The essential facts common to the several cases are as follows:

Mario Mercado Montalvo died on August 22, 1937 (R. 99, 349, 502). He left a holographic will, which was probated and notarially recorded (R. 99, 521-523), in which he designated as his sole and universal heirs his four children, all of full legal age, named María-Luisa, Margarita, Adrián and Mario Mercado Riera, the issue of his marriage to his predeceased wife, Eufemia Riera Dubocq (R. 40, 99, 513). No litigation has arisen concerning the validity of decedent's will (R. 40), which was fully accepted by the heirs (R. 102, 527, 540 bot., 542 mid., 543 bot.).

In his said will, the testator appointed Mario Mercado Riera as his testamentary executor, "*extending to him the*

statutory term of one year for whatever time might be necessary to perform his office." Of course, the insular Supreme Court had before it, considered and passed upon the *Spanish text* of the will which in this respect reads: "extendiéndole el término de un año que dice la ley *a todo el término que fuese necesario para cumplir su cometido"* (see *Mercado v. Corte,* 62 D. P. R. 381 mid., Spanish edition). Whether the Spanish phrase *"a to do el término"* be translated into English as *"for whatever," "for all"* or *"for whatsoever* time might be necessary" is immaterial, since at all events the extension is for an *indefinite* length of time. It was so construed by the Supreme Court of Puerto Rico in view of the peculiarly local provisions of the Civil Code (R. 110-112) of Spanish origin.[1]

The said extension of the executorship, not being expressly determined by the testator, it became fixed *ex lege* for only another year. Mario Mercado Riera, now ex-executor, now petitioner, failed to seek and in no way was he granted by any Court or by the heirs and legatees any further extension of his testamentary executorship (R. 112, 113 mid.).

He qualified as executor on September 1, 1937 (R. 196-197). Hence, the statutory term of one year (*P. R. Civ. Code* [1930], Sec. 826), terminated upon September 1, 1938; and the one year extension fixed by the Code in this case (*ib.* Sec. 827), expired on September 1, 1939 (Opinion of local Supreme Court, R. 112 mid.). On that date, the testamentary executorship of Mario Mercado Riera

[1] *P. R. Civil Code (1930),* Section 827: "Should the testator desire to extend the legal term, he must expressly fix the time of the extension. Should he not have fixed it, it shall be understood that the term is extended for one year. * * *" See Opinion of P. R. Supreme Court (R. 111-113), citing: Secs. 826, 827, Civ. Code, 1930 ed.; Decision of the Supreme Court of Spain of November 24, 1906, *105 Jurisprudencia Civil,* 812, 819; *Sánchez Román, Derecho Civil,* Vol. II, p. 1450; *6 Manresa, Comentarios al Código Civil,* p. 736; *4 Maura, Dictámenes (Legal Opinions),* pp. 308, 309, 351.

came to an end by operation of law (*ib.*, Sec. 832). Thenceforth, the further execution of any unfulfilled provision of the will devolved upon the heirs (*ib.*, Secs. 832, 833; R. 112 top, 114).

No special powers were conferred by testator's will on the testamentary executor (Opinion of insular Supreme Court, R. 99, 798). In such event, the executor can only perform the very limited functions specified in Section 824 of the insular Civil Code (1930, ed.). The executor is then considered, under the local law of Puerto Rico, *as a mere temporary, extrajudicial custodian of the estate* (*P. R. Civil Code, ed. 1930, §824, No. 4)* in behalf and with the intervention of the heirs, without any right to sell, collect claims, or to pay for liabilities, cancel mortgages, etc. (R. 3, 51, 117-119).[2]

Mario Mercado Riera accepted his designation as executor and through a separate proceeding provided for by local laws, qualified as such by obtaining judgment or decree for letters testamentary upon September 1, 1937 (R. 99 bot., 117, 120, 191, 196). *In Puerto Rico, a testamentary executorship does not mean that "the property of the estate is under judicial administration," i. e., under control of court or in custodia legis.*[3]

The testator, in his will, also designated Pedro M. Porrata as commissioner for partition (R. 513 bot.). In another separate proceeding, Porrata accepted and obtained judgment or decree (September 8, 1937) *in proof*

---

[2] See: *6 Manresa, Código Civil* (3rd ed.), pp. 749-750, 751; *Clemente de Diego, Comentarios al Código Civil*, Vol. 3, p. 259; *Heirs of Pellicia v. Dist. Court*, 36 P. R. R. 588, 590; *Aponte & Sobrino v. Heirs of Pérez*, 48 P. R. R. 437, 441-442; *Pérez v. Pérez*, 41 P. R. R. 844, 845; *Crehore v. The Registrar of Property*, 22 P. R. R. 30, 33; *Cibes v. Santos*, 22 P. R. R. 208; *Ex p. Suau*, 27 P. R. R. 890.

[3] Supreme Court's opinion, R. 117-120, following *Aponte & Sobrino v. Heirs of Pérez*, 48 P. R. R. 437, 441, 442; *Pérez v. Pérez & Co.*, 41 P. R. R. 844, 845.

of his credentials or authority in the premises (R. 562-568). Invoking as applicable to a commissioner for partition *the provisions of the Puerto Rico Civil Code granting executors a period of one year from date of acceptance for discharging his trust,*[4] *Porrata sought* and obtained an extension to complete performance of his duties *up to September 6, 1939* (R. 100, 568 bot.-571). *Since then, Porrata has not sought nor has he ever been granted any additional term or extension* (R. 100, 115).

The ex-executor, now petitioner, failed to prepare an inventory of the hereditary assets and liabilities within certain extensions granted him therefor (R. 99, 100 mid.). In consequence, co-heir Adrián Mercado Riera, on January 24, 1938, instituted a special, summary proceeding in the Ponce District Court, numbered 1213, whereby after accepting his interest in testator's inheritance upon benefit of inventory, he prayed that the Court order the executor, Mario Mercado Riera, to appear in court with a complete statement of the assets and liabilities of the estate, and with all other necessary data for the formation of the required inventory (R. 100, 774, 780). Thereupon, Pedro M. Porrata, as commissioner for partition, voluntarily intervened in said proceeding seeking to set aside the above stated order of January 24, 1938, requiring the then executor to furnish the necessary data for the preparation of the judicial inventory, on the alleged ground that such duty devolved upon him (Porrata) (R. 788-792, 797-800). Porrata's contention was denied by the Ponce District Court on March 2, 1938 (R. 100, 811, 812, 819). He then

---

[4] Porrata later attempted to change position (R. 85 top), but the local Supreme Court held that the terms for the discharge of executorships are applicable by analogy to commissioners for partition (R. 115, foll'g *96 Jurisprudencia Civil*, 599, 601, 602). See also: Decisions of the Supreme Court of Spain, February 24, 1927, February 22, 1929 (*173 Jurisprudencia Civil*, 699, and *187 Jurisprudencia Civil*, 807); Judgment of February 5, 1908; Judgment of January 23, 1935; Decision of the Registries, of November 13, 1903; *Sánchez Román, Derecho Civil*, Vol. 2 p. 1453.

brought a certiorari proceeding in the Supreme Court of Puerto Rico which led to the decision in *Porrata v. District Court* (April 29, 1938), reported in 53 P. R. R. 140-148, whereby the writ of review issued was quashed, the order of the District Court of January 24, 1938, requiring the then executor to bring the necessary data for the making of an inventory was upheld, and the parties interested in the estate of Mario Mercado Montalvo were urged to "cooperate with the lower court in framing a judicial inventory with all due expedition so that this estate be taken one step further along its road to division and partition" (R. 100, 854-863). It was not until September 12, 1938, that an inventory in said proceeding ♯1213 was submitted to the Ponce District Court by the then executor Mario Mercado Riera, in obedience to its affirmed decision of January 24, 1938 (R. 100, 881, 893). That was feasible, in part, due to the fact that on September 9, 1938, testator's heirs entered into a *compromise agreement* which included such inventory (R. 100, 527-548). Upon the presentation in the Ponce District Court by petitioner Mario Mercado Riera of the aforesaid inventory—that being the main objective of proceeding ♯1213—said case was thereupon *terminated* by order of September 12, 1938 (R. 891, 892).[5]

COMPROMISE AGREEMENT:

As above stated, decedent's four heirs or successors, with the intervention and acquiescence of the then (1938) executor and commissioner for partition, petitioner here, insofar as it might affect them as such, entered into a *compromise agreement* on September 9, 1938 (R. 100, 105, 527-548), whereby short periods were fixed with the ob-

[5] The insular Supreme Court and the Court of Appeals, in view of applicable local law and decisions, correctly held that neither in proceeding ♯1213, nor in any other, was there any judicial administrator appointed nor did Mario Mercado Riera ever become such (R. 104 bot, 117-119, 120 mid., 930 mid.; 152 F. 2d 96, col. 2 top).

vious purpose of promptly terminating the executorship. The first two clauses of such contract are not directly involved here, since one of them refers to the dissolution of a co-tenancy among the four heirs themselves regarding their maternal inheritance, and the other concerns the settlement of certain differences in connection with the firm Mario Mercado e Hijos, whereof the four heirs are also members (R. 100 bot., 527, 530, 533 bot.).

The *third clause* of the compromise agreement (which both appellate courts below found important enough "to warrant description in some detail" [R. 917-919, 152 F. 2d 89-90; R. 101-106, *Mercado v. Corte,* 62 D. P. R. 373-376, Spanish ed.]) consists of 18 paragraphs, respectively designated from (a) to (r), which deal with the estate of Mario Mercado Montalvo (R. 101-106, 539-547). The various covenants or paragraphs may be summarized thus:

> *In paragraph (a),* it was agreed that the hereditary properties, with their appraisal and liabilities, are those appearing on the inventory accepted by the heirs, as well as any properties, credits, rights and actions that might subsequently exist, appear or be discovered, and that the inventory should be filed in the Ponce District Court for the purposes of proceedings ♯782 and ♯1213.
>
> *In paragraph (b),* the heirs assigned to the then executor from said credit, a sum sufficient for the payment of the inheritance tax, overdue debts, testamentary charges and/or cash legacies, as shown by the inventory.
>
> *In paragraph (c),* it was stipulated that the legacies would be paid in full.
>
> *In paragraph (d),* the heirs and the partnership Mario Mercado e Hijos compromised certain differences regarding ownership of some bank deposits, and the sum of $256,000 was included among the estate's inventoried assets.

In paragraph (e), there was acknowledged in full a certain mortgage credit amounting to $78,697.23 in favor of heir María-Luisa Mercado Riera.

By paragraph (f), the heirs expressly *distributed* among themselves the other assets of the estate as follows:

"The remaining properties of the estate of Don Mario Mercado Montalvo, as appears from the aforesaid inventory, and those that might turn up afterwards as belonging to the ancestor, shall be understood as being, *and are hereby distributed* (adjudicated), share and share alike, among the four heirs, Don Mario, Doña Margarita, Don Adrián and Doña María Luisa Mercado Riera, the heirs always to endeavor to avoid the continuation of the common ownership."

(The 10% interest held by the testator in the social capital of the partnership Mario Mercado e Hijos had also been distributed by *clause 2, subdiv. "1"* of the contract [R. 538 bot.] in question, in the proportion of 2.50% to each of the four heirs.)

In paragraph (g), it was stipulated that the testamentary executor should render to the other heirs a *final account*[6] of the fruits, rents and products, or any other accretions of the hereditary estate, *within the agreed term of 15 days following the execution of the compromise contract* (September 9, 1938); and it was further agreed that if such final accounts should be objected to by any of the co-heirs respecting any of its items, the controversies or differences shall be submitted to the proper Court unless an amicable accord be reached within five (5) days after demand therefor by any of the parties.

---

[6] In an independent proceeding for settling this final account to March 4, 1940 (R. 235-240, 242), in view of appellees' objections thereto (R. 225-233, 242-244), the Ponce District Court (Judge Sepúlveda) adjudged that the ex-executor, petitioner here, by reason of improper disbursements of estate funds, repay or make restitution to heirs of monies in excess of $125,000 (R. 397-426; 427-430).

In paragraph (h), it was stated that the testamentary executor would be entitled to whatever compensation the law may provide, to legal and necessary expenses incurred as a result of the executorship, which *shall be included in the final accounts* of the executorship for the purpose of being submitted to the approval of the parties in the manner agreed upon, that is, *within 15 days* from the execution of the compromise contract.

In paragraph (i), Mario Mercado Riera, as the then testamentary executor and in connection with the estate left by Mario Mercado Montalvo, agreed again with the other heirs upon a *short term of 10 days from the date of the compromise contract,* to serve notice of the death (local estate tax return) of testator upon the Treasurer of Puerto Rico; and on liquidation of same, to pay the inheritance tax, charging the share paid for each party to his respective interest in the estate.

In paragraph (j), it was stipulated that all the legacies with interest would be paid by the then executor as provided for in the will, with leave to advance payment thereof.

In paragraph (k), the heirs undertook to secure the claims of contingent creditors by furnishing personal security; and those who failed to do so promised then to mortgage the valuable estate "Hacienda Feliz," *within three months from the execution of the contract* to the extent of their interest therein.

In paragraph (l), Pedro M. *Porrata, as testamentary commissioner, in view of the agreement between the heirs already recited* and *which includes that relating to the distribution of the estate into four undivided shares, accepted the heirs' compromise contract* (R. 544 mid.), *as follows:*

"Don Pedro M. *Porrata,* as testamentary auditor partitioner of the estate of Don Mario Mercado Montalvo, being present at the execution of this document, and *taking into consideration the fact*

that heirs, Don Mario, Doña Margarita, Doña María Luisa and Don Adrián Mercado Riera *are in agreement or conformity with the form and terms of the partition or distribution of the estate of the testator Don Mario Mercado Montalvo and with everything in connection therewith, as set forth in the present contract of compromise, accepts and joins in said contract agreeing to all of its covenants, terms and conditions insofar as they affect him as auditor partitioner of aforesaid estate,* undertaking to abide by its provisions and to comply with the letter of the present contract without making any modification, addition or alteration in the (draft of) partition[7] of the estate to be referred to in the following paragraph."

In paragraph (m), Pedro M. Porrata undertook to prepare said draft of partition *within ten days from the payment of the inheritance tax,* exclusively in accordance with the terms of the compromise contract, it being stated again that *it could not be "altered except with respect to the description of the properties* or goods of the estate, *nor modified, added to or amplified in any manner* whatsoever" (R. 545); and it was therein agreed that for the study, preparation and execution of the said draft of partition *in the manner agreed upon in the compromise contract,* the commissioner should be paid as compensation, chargeable against the estate, $20,000.[8]

In paragraph (n), it was agreed to include among the charges against the estate, the sum of $12,500, for the payment of the agreed fees,[9] expenses and costs of all kinds whatsoever, of attorneys Felix Ochoteco and Fernando Zapater, for their profes-

[7] Spanish text reads, "cuaderno particional," which means "draft of partition," as appears in opinion, local Supreme Court (R. 103).

[8] Porrata was paid this sum by the ex-executor (R. 931; 152 F. 2d 96, col. 2 bot.; see SUB-APPENDIX A-I, p. 111).

[9] Among the various disbursements by the ex-executor, which were charged to the heirs or entered for accounting purposes, there is an item for $12,500 for "executor's lawyers' fees" (R. 240, mid., 104, 545 bot.).

sional services rendered to this date to the testator, the executor of the estate of Mario Mercado Montalvo, and for any other reason in connection with the inheritance of Don Mario Mercado Montalvo, including fees for the preparation and execution of the deeds and four certified copies thereof for the heirs as set forth in clauses first, letter (D), paragraph 3, second, paragraphs 1st and third, letter (m), the cost of the Internal Revenue stamps cancelled on the respective copies delivered to the heirs to be borne by them.

In paragraph (o), it was also agreed to pay, as a charge against the estate, certain fees to attorneys for Adrián Mercado covering only professional services in above stated action $1213.

In paragraph (p), the heirs mutually authorized each other to incorporate the private compromise agreement in a public notarial deed, which was done on February 25, 1941 (R. 524-527).

By paragraph (q), as regards all deeds to be executed in the short and peremptory terms fixed in the compromise agreement, it is again stipulated that "its terms, clauses, conditions and covenants shall not be and cannot be modified, added to or changed in any manner whatsoever, nor may they be enlarged in any way whatsoever, except with respect to the description of the immovables described in each deed hereafter to be executed, and aforesaid covenant-agreements, clauses, terms and conditions shall always, in all subsequent deeds, be literally transcribed just as they have been here set forth."

(See: R. 100-104, 527, 539-547).

Respecting preceding compromise agreement, the insular Supreme Court, among other conclusions, determined that it could not be construed as an extension of the executorship (R. 112-113, 116), *in view of the short and precise terms or periods therein fixed by the heirs;* that at the date of such contract (1938) the then executor still

had about one year within which to fulfill his duties (R. 113, 116), which he did not (R. 112-113, 116), but instead allowed the executorship to expire *ipso jure* on September 1, 1939 (R. 112, 113); that no judicial administration had ever been sought or decreed to place the estate in *custodia legis* (R. 104-105, 116 bot.-119, 120); *that the* remaining *assets with the assent of all concerned, were distributed among the four heirs* (R. 116 top, 119 mid.); *and that, upon expiration of the executorship, attention to any unfulfilled provision of testator's will, devolved upon the heirs according to Section 833 of the local Civil Code* (R. 114, 115 mid., 120 mid.), etc.

Certiorari #1517 (Insular Supreme Court):

Substantially averring the facts and situation set out in the foregoing statement, respondents Adrián and María-Luisa Mercado Riera filed in the Ponce District Court a petition, dated October 27, 1941, for the surrender or delivery to the heirs and co-owners of the properties of the estate and the rendition (from March 4, 1940) of final supplemental accounts by the ex-executor Mario Mercado Riera (R. 49, 98 mid., 348-358). *This proceeding arose out of Sections 832 and 833 of the local Civil Code* (ed. 1930). They substantially provide that, upon expiration of the term fixed for the executorship, the latter terminates *ipso jure* even though the commission may not have concluded; and if the executor then refuses to deliver the estate or to render accounts, he may be judicially compelled to do so (R. 114).

Coheir Margarita Mercado Riera, upon accepting service of said petition for the return to the heirs of the hereditary assets, *expressly stated that she had no objection to such petition* (R. 49 mid., 105 mid., 361 bot., 362). Respondents Adrián and María-Luisa Mercado Riera, who were petitioners in the local Supreme Court,

and their sister Margarita Mercado Riera, represent three-fourths of the estate involved (R. 49, 105 mid.).

Petitioner Mario Mercado Riera, the ex-executor, answered on the merits to the petition for the surrender of the estate, stating, among other things, that "*with respect to the delivery of the properties* of the estate by the executor herein appearing, to the coheirs, including himself as one of said coheirs, *he has always been willing and ready to do it,*" but on condition: (1) that there should first be executed a draft of partition by Pedro M. Porrata as testamentary partitioner;[10] and (2) that security be furnished for the payment of certain legacies[11] and other alleged liabilities, etc. (R. 49 mid., 363).

As will be observed, no federal question was either raised or involved in the Ponce District Court (R. 105 mid., 363). Although Pedro M. Porrata, ex-commissioner for partition, knew (R. 365 bot.-366) of this separate proceeding for the return of the hereditary properties to the heirs, *he did not even seek to intervene therein under Section 72, Puerto Rico Code of Civil Procedure,* ed. 1933, if he felt he had any interest in the matter,[12] obviously

---

[10] The Supreme Court found that neither the executor nor the commissioner for partition complied, either within the terms fixed or subsequently, with the compromise contract (R. 115, 116, mid., 119 mid.). Respondents' objections to the so-called partitioner's report appear in the Record, pp. 396, 598-605. In Puerto Rico, *a voluntary distribution of the estate by and between the heirs* (R. 102, 116, 119 mid., 542 mid.), *especially if consented to by the then* (1938) *partitioner* (R. 103, 116 top) *and a fortiori, when the latter allowed his incumbency to expire* (R. 115), *renders unnecessary his further intervention* (Sec. 604, *Code of Civ. Proc.*, ed. 1933; *Ex p. Sotomayor*, 24 P. R. R. 172; *Irizarry v. Registrar*, 22 P. R. R. 88; *Galindo y Escosura, Legislación Hipotecaria*, Vol. 2, pp. 257-258; *Heirs of Pellicia v. Court*, 36 P. R. R. 588).

[11] Respondents and their sister, Margarita Mercado Riera, paid off their shares of all legacies with interest and other due liabilities (APPENDIX A, p. 113; See R. 240 mid., 104, 545 bot.).

[12] Porrata admitted in the insular Supreme Court that he did not have any of the properties of the estate in his possession *nor had he any objection whatsoever to have them administered by "the four coheirs,* as provided by the judgment of the local Supreme Court" (R. 141 mid.; SUB-APPENDIX A-II, p. 114; R. 931; 152 F. 2d 97).

because such proceeding was not directed against Porrata,[13] but solely against the withholding ex-executor (R. 98 mid., 358 bot.). Porrata's activities in those cases (his brief, 43 bot.), amounted to no more than a petition *starting a new proceeding* in the Ponce District Court—still pending there on motion to quash the attempted service therein—for the purported approval of a so-called commissioner's report (see *post*, pp. 35-39).

Upon November 17 and 21, 1941, the Ponce District Court heard the separate petition for the surrender of the estate to the heirs. Respondents, then plaintiffs, and the ex-executor Mario Mercado Riera, then opponent, introduced their evidence relating to said cause (R. 365 bot., 379 bot., 380). The evidence offered and admitted was mainly documentary (R. 187-189, Certiorari #1517).

Notwithstanding the Ponce District Court was reminded that the petition for the return of the estate had been finally submitted for decision since January 10, 1942, it was not until more than a year after (March 24, 1943) that the District Court of Ponce denied these respondents' petition (R. 475 bot., 476).

The Ponce District Court, through Judge Gadea Picó, though acknowledging that Mario Mercado Riera "has always been willing to deliver the estate to his coheirs so that, with respect to the delivery, there is no controversy" (R. 472 mid., 106 mid., 50), thought, though as stated, not necessarily basing his decision thereon (R. 106 bot., 472 bot.), that the several proceedings concerning decedent's estate constituted *a sort* of testamentary action or judicial administration proceeding; that the expiration of the year's executorship and its statutory

[13] Under local law, when proceeding is not directed against a person, he is not a necessary party (*Flores v. Llompart*, 50 P. R. R. 641, 645 mid.; *Rodriguez v. Arocho*, 62 D. P. R. 700 (Spanish edition); *Pellicia v. Court*, 36 P. R. R. 588.

extension for a like period did not *ipso jure* terminate the executorship; and that if Mario Mercado Riera was not a judicial administrator, he could then be considered as an agent or attorney in fact of the coheirs, etc. (R. 50, 106 mid.-107, 472 bot., 473 bot., 474).

Respondents Adrián and María-Luisa Mercado Riera, upon refusal of reconsideration by the Trial Court (R. 481, 487), petitioned the Supreme Court of Puerto Rico for a writ of certiorari to review the above decision of the Ponce District Court,[14] denying the return by the ex-executor of the estate to the co-owners and for supplemental final accounts (R. 40-58).

Serious procedural errors and harmful action in excess of its jurisdictional powers were therein ascribed to the Ponce District Court (R. 50-54), which may now be summarized thus:

> The Ponce District Court fell into grave error in excess of its jurisdiction or power and in serious and prejudicial procedural *error in decreeing the continuation of an executorship which had expired on September 1, 1939, when no extension therefor had been granted,* and in thereby refusing the unconditional delivery of the hereditary properties to its lawful owners, so they might continue any further compliance with testator's will.

---

[14] Section 670, *et seq.*, Code of Civil Procedure, P. R., 1933, empowers the local Supreme Court to issue writs of certiorari where procedure of lower Courts *is not according to the course of law, and to complete the proceedings when Court below refuses to do so upon erroneous grounds.* The granting of such review is *discretionary,* even *though appeal may also* lie, whenever in its judgment remedy by certiorari is more speedy and adequate to protect the rights involved, where Trial Courts commit errors of procedure or act in excess of their powers or jurisdiction (*Sanchez v. Zequeira,* 23 P. R. R. 47; *Nunez v. Soto Nussa,* 14 P. R. R. 190, 192; *Mendez v. Nussa,* 13 P. R. R. 366; *Sporting Club v. Foote,* 31 P. R. R. 154, 163; *Pellicia v. Court,* 36 P. R. R. 588; *Comas v. Court,* 39 P. R. R. 689, 691; *Lopez v. Court,* 40 P. R. R. 478, 480; *Franceschi v. Court,* 45 P. R. R. 646; *Pol v. Court,* 48 P. R. R. 367, 371; *Emanuelli v. Court,* 49 P. R. R. 756, 758; *Méndez v. Court,* 50 P. R. R. 671, 674; *Ortiz v. Court,* 53 P. R. R. 38; *Santana v. Court,* 55 P. R. R. 419, 421).

The District Court *exceeded its jurisdiction or powers in deciding and acting as if the estate left by the testator at his death, had been subject to a judicial administration, without same having ever been sought or decreed in any manner,* as required by Section 23 of the Law of Special Legal Proceedings (Sec. 556, *Code of Civ. Proc., P. R.,* 1933); and in deciding and proceeding as if an executorship, supposing same had not expired, amounted to a judicial administration or universal testamentary proceeding, in contravention with legal applicable provisions in the premises; and

The District Court likewise exceeded its powers and committed harmful procedural error in denying the indisputable right of the lawful owners of the estate to the rendition of final supplemental accounts, in order they might ascertain its status (R. 108).

The petition for certiorari in the P. R. Supreme Court prayed that the decision of the District Court of Ponce be set aside and for the entry of *"any other pronouncement* (relief) *that may be deemed pertinent"* (R. 58 top), *in conformity with local law and practice,*[15] empowering the insular Supreme Court to affirm or vacate and to complete proceedings when trial courts fail to do so on erroneous grounds, particularly in view that the whole record and all facts and evidence mainly documentary, were sent up to the reviewing court as part of the return (R. 59, 187-189).

The Supreme Court of Puerto Rico in the exercise of its sound discretion granted a writ of certiorari in case #1517 (R. 59) for the review of the district court's proceedings, to prevent a *manifest failure of justice in this really extraordinary case,* after respondents herein substantially averred in their local certiorari petition, among other reasons, and notwithstanding the taking or possi-

[15] Upon vacation on certiorari, local Supreme Court may complete proceedings by giving appropriate relief (Art. 670, Code of Civil Proc., P. R., ed. 1933; and see cases *infra*, p. 64, footnote 52).

bility of an appeal (R. 491) to cover possible risks if writ were denied, that within the special and peculiar circumstances of the case:

> the District Court fell into various procedural errors, in excess of its jurisdictional powers, which required prompt redress in furtherance of justice; that the large estate whose delivery or return was demanded by the heirs had been beyond their enjoyment and possession for more than five years and a half, despite the fact that since September, 1939, the executorship had legally expired and in spite of the distribution of the estate by and among the heirs since September 9, 1938; that under such circumstances, the estate was still withheld by the ex-executor due to the serious and prejudicial stand of the District Court in virtually considering the estate as if it were subject to a judicial administration, which had never been decreed in the premises; that if said procedural errors in excess of the Trial Court's powers continued, the activities of the ex-executor, in withholding the estate against the will of the then petitioners, would be equivalent to action by a judicial administrator, subjecting the heirs and the estate to the costly, drastic and illegal inspection, supervision and control of the Trial Court, when the testator's will did not even confer on Mario Mercado Riera, any special powers at all; that the Ponce District Court also fell into procedural error in excess of its powers, in restricting the lawful right of the heirs and co-owners of the estate to have final supplemental accounts rendered to them by the withholding ex-executor; that the additional circumstance exists that the then petitioners' evidence in the trial court consisted of numerous and lengthy exhibits with the testimony of one witness, and that of opponent Mario Mercado Riera, also comprised six exhibits one of which is made up of some 150 pages and another concerns a long record of an independent litigation, and that the transcription of all such evidence in the course of an ordinary appeal, together with the delays inhering therein, would cause further protraction of the case for about one additional year, which

together with the heavy expenses and drawbacks involved in ordinary appeals, would render the latter remedy fully inadequate and disadvantageous to the speedy and full enjoyment of the hereditary estate by its lawful owner, involuntarily deprived for many years of its enjoyment, all of which would amount to an evident failure of justice requiring the remedy by certiorari as indispensable and more speedy, adequate and efficacious for the protection of the rights involved; and that certiorari has been allowed to review unjustified refusal to surrender decedent's estates to heirs with the speed required in furtherance of justice (R. 55-57).

Mario Mercado Riera, having first secured leave to intervene, filed his intervention in the insular Supreme Court and moved that the writ of certiorari be quashed on substantially the same grounds raised in his answer before the District Court of Ponce, with any *"other pronouncements that this Honorable Court may deem pertinent"* (R. 65, 66, 363).

The ex-executor urged no objection to the Supreme Court's jurisdiction in the premises nor did he aver any constitutional or other federal question.

Pedro M. Porrata, ex-commissioner for partition, filed in the insular Supreme Court a so-called special appearance[16] substantially alleging that for the Court to pass upon questions relating to the commissioner's pretended duties and functions as such, he should be heard, as it would affect rights pertaining to his office without due process, in alleged violation of the Organic Act and the federal Constitution, without specifying the legal provisions involved. Porrata then prayed that the writ of

[16] Appearance is not special if not limited to challenging Court's jurisdiction over the person or if Court's judgment is invoked on any other questions (*Glass Works, Inc., v. Keegan*, 43 F. Supp. 153, 159; *Ins. Co. v. Bridge Co.*, 37 F. 2d 695; *U. S. v. Collins*, 55 F. 2d 70, 72 bot.; *Quinn v. U. S.*, 58 F. 2d 19, 20 mid.; *Richardson, etc., v. Scott*, 72 L. ed. 497).

certiorari issued be quashed "*with any other proper pronouncements*" (R. 67-69). At the same time (May 24, 1943), *the said Pedro M. Porrata lodged an answer to the certiorari petition in the local Supreme Court* (*No. 1517*), *joining issue on the merits* and practically urging the same objections that had been raised by the ex-executor Mario Mercado Riera (R. 83-96, 65; 921 mid.). This answer by Porrata seems to be wholly ignored in petitioners' brief here.

The record thus exhibits that ex-commissioner Porrata, by his voluntary intervention[17] in the local Supreme Court, invoked its jurisdiction and power on the merits (R. 83-96) to set aside the writ of review issued and "*to make any other proper pronouncements*" (R. 69), besides arguing the case at the hearing before the Supreme Court through his counsel (R. 96 bot.). Porrata was, therefore, fully heard in every respect (R. 921; 152 F. 2d. 91, col. 2 bot.).

The Supreme Court of Puerto Rico, upon July 14, 1943, after holding that the compromise agreement executed by all interested parties herein on September 9, 1938, could not be reasonably construed as extending the executorship; that it amply provided for the adjudication of the estate among the four heirs and for the payment of liabilities and legacies; that, as a matter of law, upon the expiration of its term, the executorship concluded *ipso jure* and the further execution of the testator's will devolved upon the heirs; that the fundamental question

---

[17] Puerto Rican practice follows rule that intervenor becomes a party to the action (*Fernandez v. Avellanet*, 16 P. R. R. 61; *Galbreath v. Trust Co.*, 134 F. 2d 569; *U. S. v. Pate*, 47 F. Supp. 965, 968); submits to the jurisdiction of the Court (*President, etc., v. Merritt*, 59 Fed. 6); accepts the case as it stands (*Revilla v. Court*, 39 P. R. R. 57, 63 mid.); lacks power to change the issues or to raise new ones and cannot urge dismissal of proceeding (*Miller v. Perytes*, 71 F. 2d 804, 807; *Trust Co. v. Jones*, 16 F. 2d 236, 239; *Thompson v. Deal*, 49 F. Supp. 366, 369); intervenor admitted to proceeding as it stands (*Vinson v. Washington Gas L. Co.*, 88 L. ed. 883; *Columbia, etc., Corp. v. American Fuel & P. Co.*, 88 L. ed. 1338).

"which is the gist of the whole controversy" is whether or not the executorship terminated by virtue of the expiration of the period which the testator or the law allowed the executor or whether the heirs, by their acts in accordance with the compromise contract, could extend said period; and, *after considering applicable provisions of local law,*[18] as construed by Spanish writers and the insular courts, concluded that a judicial administration had never been sought nor in any manner decreed; that the executorship in this case legally expired upon September 1, 1939, when the estate should have been delivered to the heirs, notwithstanding testator's extension of the executorship to whatever time might be necessary since any such extension should have been expressly fixed in the will pursuant to local law; that neither the executor nor the commissioner for partition complied either within the periods fixed or subsequently, with the terms of the compromise agreement (R. 97-120); and the Supreme Court below, thereupon entered its judgment vacating the order of the Ponce District Court and ordered the ex-executor Mario Mercado Riera to deliver the estate involved to the heirs and to render them supplemental accounts, for all of which 60 days were allowed[19] (R. 120 mid., 121).

---

[18] As to deference due understandings in matters of local law as expressed by the insular Supreme Court, see among other cases: *Matos v. Hermanos,* 81 L. ed. 728; *Sancho v. Texas,* 84 L. ed. 401; *Porto Rico v. Rubert,* 86 L. ed. 1081; *Torres v. Bank,* 110 F. 2d 381, 383; *De la Torre v. National City Bank,* 110 F. 2d 976, 983. cert. den. 85 L. ed. 428; *Buscaglia v. District Court, etc.,* 145 F. 2d 275, 285, cert. den. 65 S. Ct. 434; *De Castro v. Bd. of Comm'rs,* 136 F. 2d 419, 425, affd. 88 L. ed. 1384; *Hijos v. Commins,* 88 L. ed. 1396, aff'g summary dismissal of appeal from judgment construing contracts under local law.

[19] Without even allowing the 60 days fixed by the Supreme Court to elapse, the ex-executor Mario Mercado Riera, petitioner here, admitted having completely disconnected himself with the estate "*in every way, except as one of the co-proprietors of the same,*" and that "*all the affairs of said estate should be handled through the co-heirs and not through the executorship*" (R. 156, 157 mid.), and he also ren-

From said judgment entered in certiorari #1517, appeals to the first Circuit Court of Appeals were attempted by Mario Mercado Riera, *as "executor in this case"* (R. 123 bot.), and by Pedro M. Porrata, *as alleged "commissioner"* (R. 126). November 23, 1945, the Court of Appeals, after full and exhaustive consideration, affirmed the judgment of the Supreme Court of Puerto Rico (R. 912-933; 152 F. 2d 86-97).

Certiorari #1516 (Local Supreme Court):

This separate proceeding was a claim for alleged fees which attorneys Zapater and Ochoteco filed in the Ponce District Court on November 18, 1941 (R. 370), for services said to be rendered to Mario Mercado Riera from September 9, 1938, to October 27, 1941 (R. 366-368). The said attorneys estimated the reasonable worth of their services at $60,000 and asked the Ponce District Court to fix the amount thereof. In their petition for fees (paragraph 5), they expressly acknowledged that in the compromise agreement of September 9, 1938, concluded by and between the heirs and others, *"with the agreement" or consent of attorneys Ochoteco and Zapater,* the sum of $12,500[20] was agreed upon as their fees, expenses and costs of all kinds whatsoever, for their professional services to the testator, the ex-executor of the estate, *"and for any other reason (concepto) in connection with the*

---

dered *final supplemental* accounts, etc. (APPENDIX, pp. 110, 115). Shortly afterwards, respondents and co-heir Margarita Mercado Riera paid their three-fourth share of all legacies with interest and other due liabilities (APPENDIX, p. 112).

Porrata, the ex-commissioner, also stated in the local Supreme Court that he did not have any of the properties of the estate in his possession and did not have *"any objection whatsoever to have them administered * * * by the four co-heirs, as provided by the judgment of the Supreme Court"* (R. 141 mid.).

[20] A disbursement of $12,500 was charged to the heirs or entered for accounting purposes, as executor's lawyers' fees (R. 240 mid., 104, 363 mid., 545 bot.).

inheritance of Don Mario Mercado Montalvo," including fees for the preparation and execution of certain then *prospective* deeds, etc. (R. 367 mid., 545 bot., 546, 5).

Service of said petition or claim for alleged fees was attempted in the Ponce court upon attorneys (R. 369, 374 bot.) who had acted for respondents in other and separate proceedings; but no service was made upon respondents themselves, Adrián and María-Luisa Mercado Riera, who were the really interested parties (R. 380).

The co-heir Margarita Mercado Riera stated that she "did not desire to sign the said motion" (R. 375 bot.).

On November 26, 1941, Adrián and María-Luisa Mercado Riera, respondents here, specially appeared in the Ponce District Court to question *jurisdiction over their persons* and moved the quashing of service upon attorneys who acted for them in other and separate proceedings, on the grounds that claimants for alleged fees, Ochoteco and Zapater, were not parties to any pending proceeding, nor had there been any judicial administration of the estate either requested or decreed by any Court, so as to entitle them to come into it by a "motion to fix attorneys' fees"; that Mario Mercado Riera had accepted the executorship on September 1, 1937, without any special powers from the testator; that said executorship expired on September, 1939; that decedent's heirs had accepted the inheritance on or before September, 1938; that the co-heirs, through compromise agreement executed September 9, 1938, had agreed upon a division or adjudication of the estate among themselves; and that the pretended service on attorneys Celestino Iriarte and José A. Poventud was invalid, as they represented respondents in other and different proceedings, and that did not warrant their acceptance of service for said respondents nor did it empower anyone to attempt it in such fashion (R. 380-381, 98 top).

November 26, 1941, the foregoing special appearance and motion to set aside service on the attorneys, instead of on the parties themselves, was heard by the Ponce District Court (R. 384), which received documentary evidence (R. 186) and denied it on March 23, 1943.

Upon denial of reconsideration by the District Court (R. 485), which was excepted to (R. 489), Adrián and Margarita Mercado Riera applied to the insular Supreme Court for a writ of certiorari to review the order of March 23, 1943, on the ground that the Ponce District Court was without jurisdiction over the persons of Adrián and María-Luisa Mercado Riera, appellees in the Court of Appeals, respondents here, when it made the said unappealable order of March 23, 1943, and that it thereby fell into serious and prejudicial errors of procedure for the reasons specifically set out in their certiorari petition in case #1516 (R. 1-11), before the local Supreme Court.

The Supreme Court of Puerto Rico granted the writ of certiorari in the usual form. addressed to the Ponce District Court and to Judge Gadea Picó (R. 12).

On the filing of the return in the insular Supreme Court (R. 186), attorneys Ochoteco and Zapater intervened *pro se* and moved to quash the writ of certiorari issued, after asserting the validity of the assailed services (R. 19-23).

The ex-executor, Mario Mercado Riera, also secured leave to and did voluntarily intervene and move the local Supreme Court to set aside the writ *"with any other proper pronouncements* that the Court may deem pertinent" (R. 17-18).

As will be readily observed, in certiorari No. 1516 no other issue or question was raised, involved or decided by the Puerto Rican Supreme Court, but that relating to the *invalidity of service* of Ochoteco and Zapa-

ter's claim for fees. On the validity of that service depended the Ponce District Court's power to proceed against respondents.

No question of a federal character or affecting the jurisdiction of the insular Supreme Court was raised in No. 1516. Instead, its power was invoked by intervenor and now petitioner, Mario Mercado Riera, to quash the writ of certiorari issued or to enter *"any other pronouncements"* that that Court *"may deem pertinent"* (R. 18 bot.).

May 24, 1943, the local Supreme Court heard this matter (R. 23) and on July 14, 1943, rendered its opinion substantially sustaining (R. 108) the grounds urged in certiorari petition No. 1516, among them, that no special power was conferred by testator on the executor, whose duties were then those arising under Section 824 of the Civil Code (R. 99 bot., 117, 119); that the heirs agreed upon the distribution of the estate among themselves by compromise agreement of September 9, 1938 (R. 116, 119 mid.); that the executorship in this case expired on September 1, 1939, when any further fulfillment of testator's will devolved upon the heirs (R. 112, 114); that no judicial administrator was ever sought or obtained, so as to place the estate in *custodia legis* (R. 104 bot.-105, 116 mid.-120); and that the order entered by the Ponce District Court on March 23, 1943, should be set aside, as service of the claim for fees "should have been made directly on the heirs in the proper proceeding" (R. 120 bot., 98 top).

Thereupon, the Supreme Court of the Island entered *a separate judgment* granting petition of certiorari #1516 and vacating the Ponce District Court's order of March 23 (R. 24).

Claimants, attorneys Ochoteco and Zapater, then moved the said Supreme Court for a rehearing (R. 33), which was denied (R. 39).

Ochoteco and Zapater, the parties who, if at all, might have felt aggrieved by the insular Supreme Court's decision in certiorari #1516, *were not appellants in the courts of appeals* from the judgment of the local Supreme Court vacating the attempted service of their claim for alleged fees.

However, Mario Mercado Riera, who as co-defendant below, was favored by the reversing judgment entered by the local Supreme Court, in #1516, attempted to appeal therefrom to the Court of Appeals (R. 24 bot.), despite the fact that the Puerto Rico Supreme Court, upon denying the ex-executor's motion for a supersedeas bond, held that said Mario Mercado Riera, petitioner here, *is not "the party affected by the judgment rendered in this case" #1516* (R. 39 mid.).[21]

Certiorari #1518 (Supreme Court of Puerto Rico):

After expiration of the testamentary executorship (R. 112-113), Mario Mercado Riera, the ex-executor, started another proceeding in the Ponce District Court allegedly under Sections 824 and 825 of the Civil Code, for leave to use estate funds and to sell certain properties belonging to the heirs for the alleged purpose of partially paying some legacies (R. 167 bot.-169, 377-378, 450).[22]

---

[21] It is obvious that Mario Mercado Riera lacked appealable interest (see: *In re Schwartz*, 89 F. 2d 172, 173; *In re Kane*, 48 F. 2d 97, 98; *Olsen v. Jacklowitz*, 74 F. 2d 718; *Harding v. Nat. Bank*, 31 F. 2d 914).

[22] Sufficient funds were timely provided by the heirs through their compromise contract, for the payment of legacies and other liabilities (R. 101 mid., 539 bot.). The Supreme Court held that neither the executor nor the commissioner complied, either within the terms fixed or subsequently with the terms of the contract (R. 116 mid., 119 mid). Respondents and co-heir Margarita Mercado Riera *have already paid* their three-fourth share of all legacies with interest (APPENDIX, p. 110).

The ex-executor, petitioner here, attempted to serve his so-called motions on attorneys Celestino Iriarte and José A. Poventud, instead of making personal service on the real parties in interest, Adrián and María-Luisa Mercado Riera, respondents on this record (R. 169, 379, 542).

They specially appeared before the Ponce District Court and moved for the quashing of such service upon attorneys Iriarte and Poventud, as invalid and insufficient to confer jurisdiction over them *in personam*, for the reasons that Mario Mercado Riera qualified as testamentary executor on September 1, 1937, without any special powers from testator; that the heirs accepted the inheritance on or before September 9, 1938; that said executorship expired on or before September, 1939; that no judicial administration of the estate had either been sought or decreed; that the heirs had already agreed upon the adjudication of the estate through their compromise agreement of September 9, 1938; and that any previous representation of Adrián and María-Luisa Mercado Riera by attorneys Iriarte and Poventud, did not empower the latter to receive or accept service in the new proceeding nor did it warrant summoning them therein instead of the interested parties themselves (R. 170, 461).

The Ponce Court heard the matter (R. 464). Upon March 24, 1943, it denied respondents' motion to quash service (R. 478, 171 mid.), later refusing reconsideration thereof (R. 483-484, 488 mid., 171).

Thereupon, respondents herein petitioned the Puerto Rico Supreme Court (R. 165-175) for a writ of certiorari to review the unappealable (R. 174 bot.) order denying quashal of said service, on the ground that manifest and harmful errors of procedure and in excess of the Trial Court's jurisdiction had been committed, particularly for

the reasons set out by petitioners, now respondents (R. 172-175), and also in their special appearance and motion for the vacation of the above-named service in ♯1518 (R. 170, 461). The Island's Supreme Court issued the writ of review (R. 176-178).

After filing of the return in said insular Supreme Court (R. 190), the ex-executor, Mario Mercado Riera, voluntarily intervened in certiorari proceeding ♯1518 and moved that the writ of certiorari issued be set aside and for "*any other pronouncements*" that the Court "*may deem pertinent*" (R. 179-180 bot.), thus invoking the Supreme Court's jurisdiction in the premises.

On May 24, 1943, the Puerto Rico Supreme Court below heard this case (R. 181). It delivered its opinion upon July 14, 1943 (R. 97-121). The Supreme Court substantially upheld the grounds urged in certiorari petition ♯1518. They were practically the same as those adduced in ♯1516, which have already been summarized here.

A separate judgment was thereupon entered by the local Supreme Court, granting certiorari petition ♯1518 and setting aside the Ponce Court's order of March 24, 1943 (R. 181 bot.).

From that judgment, Mario Mercado Riera has likewise attempted to appeal to the Circuit Court of Appeals (R. 182). This, notwithstanding the sole question obviously submitted in that case and decided below, was the invalidity of service of petition in the trial court, which involved no constitutional or other federal question. Moreover, the local Supreme Court, *in view of the nature of the judgment in ♯1518,* denied a motion by Mario Mercado Riera (R. 184) and held that "the fixing and giving of a supersedeas bond does not lie" (R. 185 bot.).

THE VARIOUS AND SEPARATE JUDICIAL PROCEEDINGS CONCERNING DECEDENT'S ESTATE:

In view of the placement[23] in the printed record, occasionally without chronological order, of the several and different judicial proceedings in the insular courts, in connection with the estate of decedent, Mario Mercado Montalvo, a brief explanation regarding them seems necessary in order to a proper understanding of the questions now sought to be urged.

Petitioners seem to intimate (Br. 67-J), without any foundation whatever, that there was only one case below involving the whole estate. But under prevailing local law and practice, *there are divers and independent proceedings*[24] which are usual during the settlement of a decedent's estate, when no judicial administration is asked by the heirs and decreed by a court of justice in order to place the estate in *custodia legis*.[25]

---

[23] Petitioners' respective designations, though expressing that record on appeal "shall contain the complete record of the case," also state that they promptly *instructed* the Clerk of the Supreme Court of Puerto Rico "as to the contents of the record" on said appeals (R. 132-133 mid.).

[24] In Puerto Rico, proceedings for probate of will, for letters testamentary, for securing an inventory for approval of a partition, for settlement of accounts, for surrender of the estate to the heirs, etc., are independent of one another, and each arises from different legal provisions, and is subject to separate pleadings, filing fees, hearings and judgments (*Marvez v. Court*, 48 P. R. R. 152, 155 mid.; *Díaz v. Court*, 49 P. R. R. 732 bot.; *Boerman v. Heirs of Boerman*, 52 P. R. R. 593; and see *Labarthe v. Neuman*, 23 P. R. R. 640; *Mercado v. Mercado*, 152 F. 2d 89.

A judicial administration must be independently and separately petitioned for and judicially granted under Section 556, Code of Civil Procedure, ed. 1933 (*Dexter v. Nussa*, 13 P. R. R. 340; *Sanchez v. Calderón*, 19 P. R. R. 1043, 1046; *Vicens v. Cruz*, 20 P. R. R. 179, 181; *Sabater v. Escudero*, 23 P. R. R. 794; *Ex p. Suau*, 27 P. R. R. 890; *Ex p. Vega*, 28 P. R. R. 361; *Aponte v. Heirs of Perez*, 48 P. R. R. 437, 441-442; *Perez v. Perez & Co.*, 41 P. R. R. 844, 845; *Sucn. de Jesús v. Court* (May, 1945), 65 D. P. R. 3 bot. (English ed. not yet out).

[25] No judicial administrator was ever sought or appointed to place the estate in *custodia legis* (R. 104, 105, 116 bot., 119, 120). Petitioner Porrata even acknowledged that testator provided in his will "everything that is necessary for an *extrajudicial* liquidation," *which always is beneficial to the heirs, legatees and creditors of the estate* (R. 799 near bot.).

With respect to the estate left by Mario Mercado Montalvo, these separate proceedings brought in the insular courts may be severally summarized as follows:

1. *Probate of testator's holographic will:*

The probate of a holographic will is an independent proceeding established by the *Civil Code,* ed. 1930, Secs. 639 to 643.

The petition for such probate was filed on August 28, 1937 (R. 498), and after hearing of the matter (R. 520), *it was closed by decree* of the Ponce District Court accepting the will as proven and ordering it recorded in the protocol of a notary public (R. 521-523; R. 915, 152 F. 2d 89).

2. *Application for letters testamentary:*

Section 597 of the Code of Civil Procedure, ed. 1933, provides that when an executor accepts appointment under a will, he must file *with a notary* or officer in whose office the will is recorded, a written acceptance thereof, with his oath of office and that the District Court of decedent's domicil or of the place where the property is located, shall, on the filing of the notary's certificate as to such acceptance and oath, issue *letters testamentary "which shall be evidence of his authority."* In pursuance of these provisions, the then executor appointed by testator's will, made an *ex parte* application (R. 191) to the Ponce District Court for the issuance of letters testamentary. Thereupon, dated September 1, 1937, the District Court entered its decree granting such letters in proof of the then executor's acceptance of the trust (R. 915-916; 152 F. 2d 89).

Contrary to what petitioners state in their brief (p. 63B), under Puerto Rican law a petition for letters tes-

tamentary (§597, *supra*), as evidence of an executor's limited duties, *is quite different from a petition for a judicial administration* of an *estate* or letters of administration, which must be independently and separately procured and granted under §556, Code of Civil Procedure, ed. 1933. See footnote 24 (*ante*, p. 29).

3. *Qualification by commissioner for partition:*

Adopting, by analogy, the same procedure followed by the then executor, Pedro M. Porrata, co-petitioner here, applied *ex parte* to the Ponce District Court for "credentials" showing his authority as auditor-partitioner (R. 502-566) and, accordingly, a decree was made on September 8, 1937 (R. 566). Reciting that the *partitioner is "subject to the provisions of articles 826 to 839 of the aforesaid Civil Code of 1930,* which articles grant the executor a period of one year from the date of his acceptance, for the purpose of performing his trust and closing the executorship" (R. 568 bot., see footnote 4, *ante*, p. 5). Porrata asked for and obtained an order after judgment in that proceeding, extending his term to comply with his duties to deliver "the definite partition of the estate to the parties entitled to it until the sixth day of September, 1939" (R. 570, 571 mid.).[26] See also opinion below; R. 916, 152 F. 2d 89, col. 1 mid.

4. *Case #1213, for acceptance of inheritance by one heir on benefit of, and for order to prepare, inventory of assets and liabilities.*

This matter is regulated by the Civil Code of Puerto Rico, ed. 1930, Sections 964 to 988. Under Sections 964, 968, par. 2, and 971, any heir may accept an inheritance

[26] The local Supreme Court found that neither the executor nor the commissioner complied, either within the terms fixed or subsequently, with the contract (R. 116 mid., 119), and that the latter had neither sought nor been granted any additional term (R. 115, 119).

on benefit of inventory by requesting, at the same time, the formulation of an inventory of the estate. As no inventory was forthcoming from the then executor, who assumed custody of the inheritance, notwithstanding certain extensions granted him therefor (R. 99, 100 mid.), co-heir Adrián Mercado Riera, one of respondents herein, brought the said proceeding No. 1213[27] where he secured an order from the Ponce District Court to compel Mario Mercado Riera to produce in court a statement of assets and liabilities of decedent, with all other required data, for the preparation of an inventory that might apprise the heirs as to testator's economic situation (R. 100, 774, 780).

This case was initiated in the Ponce District Court by an independent petition (R. 774), with its own separate pleadings (R. 788, 790, 797), hearing and decision (R. 811, 819).

Upon review on petition of appellant Porrata, who had intervened in the case, the Supreme Court of Puerto Rico upheld the District Court's order for the preparation of an inventory by the then executor (R. 857, 863 mid.; *Porrata v. District Court*, 53 P. R. R. 141, 184), and in compliance with the District Court's order, as affirmed by the local Supreme Court, Mario Mercado Riera submitted an inventory in proceeding #1213, *which the District Court then closed by order of September 12, 1938* (R. 891, 892, 893 bot.). See also opinion below; R. 916-917, 152 F. 2d 89.

[27] Though in such proceeding, under Section 974 of the Civil Code, ed. 1930, a judicial administration could have been asked, none was demanded nor provided for therein as correctly found by the Puerto Rican Supreme Court (R. 104 bot.; *Mercado v. Corte*, 62 D. P. R. 376 bot., Spanish edition).

5. *Proceeding for settlement of final accounts rendered by Mario Mercado Riera up to March 4, 1940.*

The duty to submit accounts by extrajudicial executors to the heirs, legally arises from *Section 829* of the Civil Code of Puerto Rico, ed. 1930.

Moreover, the co-heirs in their compromise agreement of September 9, 1938, stipulated that the then testamentary executor, petitioner here, should render to the heirs a *final account within the mandatory period of 15 days from the execution of such contract* and that any opposition or controversy in connection with the items of the account, should be submitted to a competent court unless an amicable agreement could be reached within 5 days after demand or notice by any of the parties (R. 45, 102 mid., 542 bot.).

The period of 15 days fixed for the then executor to file his *final accounts,* expired on September 24, 1938. The accounts were rendered to the heirs one year and six months thereafter, *i. e.,* on March 6, 1940 (R. 105, 234, 235-242) by petitioner, Mario Mercado Riera as alleged "executor" (R. 234), and not as "'judicial administrator, as mistakenly intimated in petitioners' brief (p. 69-L). It was through that agreed medium (rendition of final accounts, see 152 F. 2d 91, col. 1, 96, col. 2 bot.), that the ex-executor was to charge to and/or claim from the heirs any proper, legal or warranted disbursements from estate funds; and so Mario Mercado Riera claimed certain amounts for alleged fees to attorneys, scholarships to some students, alleged traveling expenses, etc. (R. 236, 237, 238, 240).

But co-heirs Adrián and María-Luisa Mercado Riera, through the stipulated procedure and believing there were numerous omissions, charges or claims by the ex-executor which were unwarranted or improper, due to his lack of

power, as illegal, unnecessary or otherwise, filed in the Ponce District Court (March, 1940), their objections, original and supplemental (R. 225-233, 242-244), challenging the said final accounts and serving demand upon their co-heirs that, within five days, they indicate their acceptance of the objections or any propositions or explanations they might wish to make to enable objectors to determine whether an agreement was probable, and otherwise to submit the controversies to court (R. 233), and further reserving any other or further objections in the premises (R. 243 bot.).

A detailed answer or reply was thereupon filed by the ex-executor (R. 269-284), petitioner here. This separate proceeding was heard before Judge Sepúlveda, of the Ponce District Court, commencing November 12, 1940, the trial and presentation of evidence taking a total of 31 days (R. 398 bot.).

On February 19, 1942, the Ponce District Court, through Hon. Judge Sepúlveda, rendered his opinion (R. 397-426) and entered a final decree sustaining many of the objections to the said final account rendered by Mario Mercado Riera, petitioner on this record, whereby the latter was ordered to make restitution to the heirs in an amount which, with interest allowed, exceeds $125,000 (R. 427-430). This is the decision which petitioners, in their Statement on Appeal below (p. 45), justly characterized as *"very careful and thorough"* and *"impartial in its tone and method."*

Among other items objected to by Adrián and María-Luisa Mercado, Judge Sepúlveda orders Mario Mercado Riera to make restitution as to $11,244.16, with legal interest, because Mario continued to spend estate funds on the restoration of a house which had been conveyed to him (R. 400 mid., 427); $16,392.25, with legal interest, as

being an improper entry against the estate, which should have been charged to and paid for by the firm Mario Mercado e Hijos (R. 404, 427 bot.), of which Mario Mercado Riera was also managing director (R. 424), and member with an interest of 55% (R. 539); $20,019.15, as improperly charged to the heirs and paid on a sum of money belonging exclusively to the said partnership Mario Mercado e Hijos (R. 419-429 mid.); $13,452.29, with interest, which was improperly paid out of estate funds in connection with the local inheritance tax, without prejudice to objectors' right to make further objections against items of such nature in future supplemental accounts (R. 418 mid., 429); $23,500 which should be restored to the final account as improper outlays for alleged attorneys' fees and traveling expenses (R. 408 mid.-410, 428 mid.); $7,208.11, as an excessive charge and self-payment by the ex-executor, petitioner here, for his alleged compensation (R. 413-415, 429), etc.

Mario Mercado Riera then *appealed to the Supreme Court of Puerto Rico* from said final decree on the accounts (R. 432); and co-heirs Adrián and María-Luisa Mercado also appealed therefrom in part (R. 437), as a few of the objections to the final account were overruled by the District Court of Ponce (R. 401-403, 423-425).

These appeals are still pending and undecided in the insular Supreme Court (R. 105, 119 mid., 438-444).

The foregoing clearly shows that matters concerning claims between the ex-executor and the heirs respecting alleged attorneys' fees, taxes and any other outlays or disbursements out of or concerning hereditary funds have been submitted to a judicial adjudication, in accordance with local law and their compromise agreement, through the separate proceeding brought by the interested parties

and independently conducted for the settlement of the ex-executor's final account to March 4, 1940 (R. 105), which is still pending decision, on appeal, by the Supreme Court of Puerto Rico. That is why the Court of Appeals stated that, if there is any question of fees in the background, "the accounting proceeding, not this, would be the appropriate place to settle it" (R. 931; 152 F. 2d 96, col. 2 bot.).

6. *Proceeding for surrender of the estate to the heirs or co-owners, which originated Certiorari No. 1517.*

7. *Claim for alleged fees by attorneys Ochoteco and Zapater, which gave rise to Certiorari No. 1516.*

8. *Petition to sell certain properties of the estate for the alleged purpose of partially paying some legacies, which caused the Certiorari Case No. 1518.*

The legal source, separate initiation, pleadings, conduct, hearings and different judgments in these three independent proceedings have already been sufficiently dealt with in this brief (*ante*, pp. 12, 43, Cert. #1517; pp. 22, 43, Cert. #1516; pp. 26, 43, Cert. #1518).

9. *New proceeding for purported approval of a so-called report by ex-commissioner Porrata.*

Dated March 14, 1940, ex-commissioner for partition Porrata, co-petitioner here, *extrajudicially* sent to testator's heirs what he designated copy of "a tentative Partitioner's Report" (R. 597, 607-770).

March 16, 1940, Adrián and María-Luisa Mercado Riera answered Porrata's letter and urged numerous well-grounded objections (R. 598-603) to the so-called partitioner's report. Among others, the objectors stated (R.

598 mid.) that such *draft of partition should have been formally prepared within 10 days from the payment of the local inheritance tax* and should have been perfected exclusively *in compliance with compromise agreement* of September 9, 1938, clause 3, paragraphs (i) and (m), *which prohibit enlargement of draft of partition except with respect to description of properties of the estate,* and forbade that the parties' agreement should be modified, added to or changed in any manner whatsoever (R. 103 bot., 545; 152 F. 2d 90, 91, col. 1).

Yet, matters which did not concern the ex-commissioner and which were involved and at issue (sub-judice) in the proceeding to settle the ex-executor's final account, were also attempted to be included in the said draft of partition and thus to be imposed upon the heirs. So, objection was further urged on that score (R. 598 bot.-600). Additional specific objections were made by respondents Adrián and María-Luisa Mercado Riera, who also reserved all of their rights in the premises (R. 600-601).

Further, the said compromise agreement of September 9, 1938, concerned Porrata only as *then testamentary commissioner* for partition (R. 527 mid., 544-545); *but Porrata allowed his term of office to expire on September, 1939, without complying with the terms of the said agreement* (R. 116 mid., 119 mid.).

November 26, 1941 (R. 395), Porrata filed in the Ponce District Court his so-called extemporaneous draft of partition, along with a petition (R. 385 *et seq.*) for its purported approval (R. 394, par. 8), which he attempted to serve on attorneys Iriarte and Poventud instead of on respondents Adrián and María-Luisa Mercado Riera, who were, if at all, *the interested parties* (R. 395).

Thereupon, said Adrián and María-Luisa Mercado Riera specially appeared in the Ponce District Court and

moved for the quashing of the attempted service in that new proceeding, because personal notice or summons was required on the aforesaid movants, since any prior representation of attorneys in other matters did not authorize them to accept nor anyone to attempt service on them in lieu of on the parties themselves; and as it appeared that prior to the filing of said draft or report and petition for its purported approval *Porrata had ceased as commissioner for partition of decedent's estate,* respecting which there had been no judicial administration decreed, and the heirs, further and with the acceptance of the then partitioner, had agreed upon a distribution of the hereditary estate (R. 396-397).

No hearing thereon was obtained by Porrata and, hence, no action has been taken by the Ponce District Court upon the foregoing motion for the quashal of service in such new proceeding. Instead, *Porrata chose to intervene in certiorari proceeding No. 1517 before the insular Supreme Court* (surrender of the estate to the heirs) and there raised the matter concerning his alleged draft of partition, accompanying his so-called report or draft (R. 69, 70) and also Adrián and María-Luisa Mercado's motion for quashal of service (R. 81), praying the Supreme Court that the writ of certiorari issued be annulled "with any other proper pronouncements" (R. 69 top).

At the same time (May 24, 1943), petitioner Porrata also filed an answer in Certiorari No. 1517, before the local Supreme Court, taking issue on the merits, substantially raising the same points urged by the ex-executor (R. 65), and so inviting action thereon by the insular Supreme Court (R. 83, 88 *et seq.*), with jursidiction of the subject-matter and of the parties thus before it. That the Supreme Court below heard intervenor and passed upon the question submitted, not simply as involved in the case, but at the invitation of Porrata him-

self, is not only right, but constitutes a result as to which said petitioner cannot speculate or complain.[28]

Porrata then, through counsel, argued his boundless contentions before the Puerto Rican Supreme Court (R. 96 bot.), which upon July 14, 1943, held that neither the executor nor the commissioner complied, either within the terms fixed or subsequently with the compromise contract (R. 115, 116, 119); and that, among other things, the heirs had accepted the inheritance and agreed upon its distribution (R. 102, 116, 119 mid., 542 mid.).

And in Puerto Rico, a voluntary distribution of the estate among the heirs, specially if consented to by the then (1938) partitioner (R. 103, 116 top) and, *a fortiori*, if the latter subsequently permits his incumbency to expire (R. 115), renders superfluous any further action by the ex-commissioner.[29]

---

[28] See: *Mercelis v. Wilson*, 59 L. ed. (U. S.) 370, 371, col. 2 mid.; *Devine v. Zimmerman*, 133 F. 2d 850, 852 mid.; *Pitcairn v. Fisher*, 78 F. 2d 649, 651; *Power Co. v. Co.*, 65 F. 2d 298, 302 mid.

An intervenor becomes a party to the proceeding (*Fernandez v. Avellanet*, 16 P. R. R. 61; *Galbreth v. Trust Co.*, 134 F. 2d 569; *U. S. v. Pate*, 47 F. Supp. 965, 968), submits to Court's jurisdiction (*President, etc., v. Merrit*, 59 Fed. 6), accepts the case as it stands (*Revilla v. Court*, 39 P. R. R. 57, 63 mid.), lacks power to change the issues or to raise new ones and cannot urge dismissal (*Miller v. Perytes*, 71 F. 2d 804, 807; *Trust Co. v. Jones*, 16 F. 2d 236, 239; *Thompson v. Deal*, 49 F. Supp. 366, 369).

[29] Sec. 604, Code of Civil Procedure, ed. 1933; *Ex p. Sotomayor*, 24 P. R. R. 172; *Irizarry v. Registrar*, 22 P. R. R. 88; *Galindo y Escosura, Legislación Hipotecaria*, Vol. II, pp. 257, 258; *Pellicia v. Court*, 36 P. R. R. 588.

ARGUMENT.

I.

The Supreme Court of Puerto Rico had complete jurisdiction on certiorari to the District Court of Ponce in Cases ♯1516, ♯1517 and ♯1518 (Petitioners' brief, Point I, pp. 22-33).

Petitioners here, appellants below, amazingly purport to question, as they did for the first time in the Court of Appeals, the jurisdiction of the insular Supreme Court on certiorari to the Ponce District Court, under Section 40 of the Organic Act of Puerto Rico (48 U. S. C. A., Sec. 861).

To the contrary, respondents believe that even the most cursory examination of Section 40 of the Puerto Rico Organic Act shows that dismissal of the point raised seems foreordained.

(A) *Insular Supreme Court's unrestricted power to construe and modify decisions on local laws.* Petitioners' points on this score are not easily understood, except by hesitatingly accepting their timid assertion (Br. 26 bot.) that it is to be presumed Congress, by Section 40 of the Organic Act (1917), intended to continue the operation of insular tribunals under existing laws *"with the judicial interpretation that had theretofore been put upon them,"* by the insular Supreme Court.

Of course, respondents deny, in accord with the Court of Appeals, that prior to the last Organic Act for Puerto Rico (1917), the insular Supreme Court had construed the local certiorari law of 1904 as withholding from litigants discretionary review under it of rulings by inferior courts, whether appeal lay or not, where there was pro-

cedural error or action taken in excess of a court's powers or jurisdiction (R. 924; 152 F. 2d 86, 92-95).

But *even assuming arguendi gratia* that such had been the case, the *contention that* the Puerto Rico *Supreme Court could not modify, change,* narrow or even *overrule its prior decisions* concerning the local certiorari act of 1904, is evidently far-fetched and untenable.

By the general rule of international or public law, whenever political jurisdiction and legislative power over territory are transferred from one nation to another, the courts, laws and institutions of the ceded country, enacted for the protection of private rights, unless inconsistent with the Constitution of the acquiring government, continue in force until repealed or modified by the new sovereign.

Out of abundant caution[30], Sections 8 and 33 of the first Organic Act (known as Foraker Law) for Puerto Rico of 1900, continued in force, except as repealed or amended by the local legislature or by act of Congress, all insular laws and ordinances then in force, and vested the judicial power in the courts of Puerto Rico functioning on such date, under and by virtue of the then prevailing laws. The present Organic Act, enacted by Congress on March 2, 1917, Sections 40 and 57, similarly vested the judicial power in the local tribunals as organized on March 2, 1917, under and by virtue of laws then in force, and continued their jurisdiction and form of procedure, as also their various officers, as provided by law at said date until otherwise enacted.

These provisions in the organic acts were mere *saving clauses* continuing insular statutes not in conflict with the Constitution and laws of the United States; *but they placed no limitation or restriction on the autonomous*

[30] See *Ortega v. Lara*, 50 L. ed. 1056, col. 2 mid.; and *Ponce v. Roman, etc, Church*, 52 L. ed. 1068, 1074, col. 2 bot.

position and power of the insular Supreme Court to construe, modify, change or overrule its own decisions respecting local laws as, for instance, concerning the scope of the Puerto Rico Certiorari Act of 1904 (*Brewer v. Browning*, 115 Miss. 358, 76 So. 519, L. R. A. 1918 F. 1185[21]; *Backus v. Fort St. Union Depot Co.*, 42 L. ed. 853, 860; *W. Va. State Bd. of Educ. v. Barnette*, 87 L. ed. 1628, 1640, overruling prior decisions).

Territorial statutes thus continued in operation are to be construed as they would be if they were enacted after the adoption of a state constitution. *Nadeau v. Conn.*, 142 Wash. 242, 252, p. 913.

Courts do not make law but simply declare it. A judicial decision is but evidence of the law and an overruling decision does not change law but impeaches the prior decision as evidence of it. *Cuesta & Co. v. Treasurer*, 54 P. R. R. 82, 84; and see *Fleming v. Fleming*, 68 L. ed. 547, 549, col. 2 mid.; *Succ'n of Tristani v. Colón* (1st Cir.), 71 F. 2d 374.

This Court of Appeals below has also recently held that, on questions of local law, the territorial courts of Puerto Rico have the broad powers of other appellate courts to overrule their own prior decisions. *Ballester-Ripoll v. Court of Tax Appeals of Puerto Rico*, 142 F. 2d 11, 17 bot.

The Organic Act of 1900 (Sections 6 and 81) enacted by Congress for Hawaii, as in the case of Puerto Rico, continued in force the laws and tribunals then existing (48 U. S. C. A., Secs. 496, 631); and, notwithstanding, the construction of local statutes by the Supreme Court of

[21] Holding that constitutional provisions vesting the judicial power of the state in the Supreme Court and such other courts as are provided for by the Constitution, and also providing that the Supreme Court shall have such jurisdiction as properly belongs to a court of appeals, placed no restriction on the power of the Supreme Court to overrule or change its decisions.

Hawaii has been always accepted, even by this Supreme Court, as stating the law of the territory. *Waialua Agricultural Co. v. Christian*, 83 L. ed. 61, 72.

(B) *Organic Acts did not, by adoption, convert local statutes into federal laws.* An apparently plausible, though equally frail argument, if intended by petitioners, would be to contend that, for appellate jurisdictional purposes and by reason of Section 57 of the present Organic Act of Puerto Rico (48 U. S. C. A., Sec. 735), commonly called the Jones Act (1917), the insular Certiorari Act of 1904 became, *by adoption*, a law of the United States and that, therefore, any ruling thereon by the Courts below would involve a law of the United States or denial of a right claimed thereunder, thus originating a federal question. But even that point has been unsuccessfully urged before, based on similar provisions of the Foraker Act (1900), with resulting dismissal of a writ of error by this Honorable Court. *Ortega v. Lara (P. R.)*, 50 L. ed. 1055, 1057, col. 1.

(C) *The local Certiorari Act confers broad jurisdiction and discretionary powers.* Pursuant to authority conferred by Sections 8, 15 and 33 of the Foraker Act (1900), to legislate as it may see fit with respect to existing insular courts, as to "their jurisdiction, their procedure and all other matters affecting them," and also in accordance with Section 32 of said Foraker Act, granting general legislative powers as to all matters not locally inapplicable,[32] the Legislature of Puerto Rico, upon March 10, 1904, approved *"An Act Authorizing Writs of Certiorari."*[33]

---

[32] The aim of the Foraker Act (1900) and of the Organic Act (1917) was to give Puerto Rico full power of local self-determination with an autonomy similar to that of the States and incorporated territories (*Puerto Rico v. Shell Co.* [1937], 82 L. ed. 236, 243, col. 1 top; *Peo. of P. R. v. Hermanos* [1940], 84 L. ed. 916, 918; and see *Ponce v. Roman, etc., Church*, 52 L. ed. 1068).

[33] See Laws of 1904, pp. 132-133, now embodied in Sections 670, *et seq.*, Code of Civil Procedure, ed. 1933.

The local Supreme Court and the several insular district courts were thereby empowered, generally and almost unrestrictedly, to issue writs of certiorari. *Section 1* of the statute defines the writ thus:

> "A writ issued by a superior to an inferior court requiring the latter to send to former a certified copy of some *proceeding* therein *pending, or* the record and proceedings in some cause already *terminated* in cases *where procedure* is *not according to the course of the law, and to complete the proceedings when the lower court refuses* to do so *upon erroneous grounds.*" (Italics ours.)

The local Certiorari Act does not, as appellants seem to contend, simply re-enact the traditional common law writ. It grants unbounded discretion and ample jurisdiction, as its plain wording indicates, for review by certiorari of proceedings in causes *pending or terminated,* where procedure is not according to law, *and to complete proceedings when the lower courts refuse* it *on erroneous grounds.*

In the exercise of its discretionary powers, the insular Supreme Court has from time to time and in view of the nature of each case, decided that the writ issued should be quashed where, *in absence of special circumstances* (which were shown in ¶1517; R. 55-57; R. 924-928), there is a plain, speedy and adequate remedy in the ordinary course of law, etc.

But the insular *Supreme Court has also from the beginning interpreted* the local *Act of 1904,* upon the basis *that* the granting of review by *certiorari* is *discretionary; that even though appeal might lie, the writ issues (Nuñez v. Soto Nussa* [*1908*], 14 P. R. R. 190, 192; *Sanchez, et al., v. Cuevas Zequeira* [*1915*], 23 P. R. R. 47; R. 927), whenever in its discretion the remedy by certiorari is more speedy and adequate for the protection of the rights involved, where trial courts overreach their powers, as-

sume facts not proven and otherwise commit procedural errors or proceed in excess of powers as authorized by the case before them.

That is the uniform construction placed upon the Puerto Rican certiorari statute of 1904, by the lower Supreme Court before and after the Organic Act of 1917.[34] The coverage of the Puerto Rico Certiorari Act is a matter solely for the determination of local courts (*Sage Stores Co. v. Kansas,* 89 L. ed., Adv. Ops., pp. 22, 23, col. 1, bot.). And such authoritative construction of the insular statute binds federal courts (*U. S. v. Texas,* 86 L. ed. 356, 362, col. 1, mid.; *Allen-Bradley Local v. Wisconsin, etc.,* 86 L. ed. 1154, 1163, col. 2, mid.; *Matos v. Hermanos,* 81 L. ed. 728, 730; *Puerto Rico. v. Rubert Hnos.,* 86 L. ed. 1081, 1088).

In Case #1517, the Supreme Court of Puerto Rico exercised its sound *discretionary powers*[35] and granted the writ of certiorari (R. 59), in view of the serious procedural errors and detrimental action of the Ponce District Court *in excess* (not in absence) of its jurisdictional powers and in order *to prevent a manifest failure of justice* in a really extraordinary case, such as the one here shown (*ante,* pp. 15-20). The special and peculiar circumstances warranting review therein, were also par-

[34] *Mendez v. Soto Nussa* (1907), 13 P. R. R. 366; *Nunez v. Soto Nussa* (1908), 14 P. R. R. 190, 192; *Sanchez v. Cuevas Zequeira* (1915), 23 P. R. R. 47; *Sporting Club v. Foote,* 31 P. R. R. 154, 163; *Pellicia v. Court,* 36 P. R. R. 588 (certiorari to review order refusing surrender of estate to heirs); *Comas v. Court,* 39 P. R R. 689; *Lopez v. Court,* 40 P. R. R. 478; *Franceschi v. Court,* 45 P. R. R. 647 (certiorari to review denial of delivery of estate to heirs, even where executors had become judicial administrators); *Pol v. Court,* 48 P. R. R. 366; *Emanuelli v. Court,* 49 P. R. R. 756; *Mendez v. Court,* 50 P. R. R. 671; *Ortiz v. Court,* 53 P. R. R. 38; *Santana v. Court,* 55 P. R. R. 419, 421; *Mercado Riera v. Mercado Riera,* 152 F. 2d 93-95; R. 924-928).

[35] Except in case of abuse, not shown herein, discretionary action is not reviewable (*Puerto Rico v. Rubert Hnos.,* 86 L. ed. 1081 mid., 1089, col. 2 top; *Barcelouz v. Buffen,* 51 F. 2d 82, 85; *Schram v. Poole,* 97 F. 2d 566, 570, col. 2 mid.).

ticularly set out in respondents' certiorari petition to the local Supreme Court, #1517 (R. 55-57; *ante,* pp. 16-19). And the said Supreme Court, among other things, correctly concluded that (R. 120 mid.):

> "In our judgment, the lower Court [Ponce district court] *exceeded its jurisdiction* when holding that the hereditary estate was under *custodia legis,* without any judicial administration having been decreed. * * *"

In Cases Nos. 1516 and 1518, separate petitions for certiorari were presented by these respondents to the Supreme Court of the Island, *to review questions as to the jurisdiction over their persons (in personam)* through lack of service on them, after charging that the District Court fell into serious and prejudicial errors of procedure for the reasons detailed in their respective petitions (R. 1, 9-10; 165, 170-174). The local Supreme Court also granted writs of certiorari in Nos. 1516 and 1518 (R. 12; 176-178), as it had done before when absence or improper service of process was involved (*Moore v. Dist. Court,* 59 P. R. R. 618), *or where, in pending cases, procedural errors appeared from non-appealable orders* (*Riviere Trustee v. Dist. Court,* 60 D. P. R. 732; *Rodríguez v. District Court,* 60 D. P. R. 919, Spanish editions). The insular Supreme Court finally set aside in Nos. 1516 and 1518, the order of the Trial Court of March 23 and 24, 1943, on the ground that service of process therein was improper and invalid (R. 120 bot.-121; 24; 181).

II.

Petitioner Porrata, as intervenor in Certiorari #1517, lacks the necessary reviewable interest. However, there was never absence of due process below (Petitioners' brief, Point III, pp. 39-61).

Porrata's alleged interest in Certiorari No. 1517, was and is insufficient to entitle him to any review herein.

The *petition for the surrender of the estate to the heirs* and the rendition of supplemental accounts *was directed solely against the ex-executor Mario Mercado Riera* (R. 348-358, 121, 920 mid.; 152 F. 2d 91, col. 1 mid.).

This was a special proceeding authorized by Sections 832 and 833 of the Puerto Rico Civil Code (ed. 1930), providing, in short, that upon expiration of an executorship's term, the incumbency concludes *ipso jure* even though not then completed; and that, in case the ex-executor refuses to return the estate or to render accounts, he may be ordered to do so by a court of justice (local Supreme Court's decision, R. 114).

Petitioner Mario Mercado Riera, the ex-executor, answered on the merits averring, among other matters, that with respect to the delivery of the properties to the co-heirs, "he has always been willing and ready to do it," but on condition that there should first be executed a draft of partition by Porrata as testamentary partitioner, etc. (R. 363, 49 mid.).

As will be observed, petitioner Mario Mercado Riera raised in the District Court of Ponce and then urged in the local Supreme Court, the question relating to Porrata's alleged draft of partition under the compromise agreement, praying that the writ issued be quashed, with any "other pronouncements that" the Supreme Court below "may deem pertinent" (R. 65-66, 363).

Ex-commissioner *Porrata did not possess the hereditary assets.* Hence, he did not have either to surrender them or to render any accounts to the heirs. That, he conceded to be the factual situation in the local Supreme Court, and Porrata himself stated that he did not entertain "any objection whatsoever to have" the properties "administered * * * by the four co-heirs, as provided by the judgment" of the insular Supreme Court (R. 141 mid; Sub-Appendix A-II, pp. 114-116). That is why the proceeding for the surrender of the estate to the heirs *was not directed against Porrata, since he was not a necessary party;*[36] and obviously for those reasons Porrata himself chose not to intervene in that proceeding (surrender of estate) in the Ponce District Court under *Section 72* of the Puerto Rico Code of Civil Procedure, ed. 1933, notwithstanding he well knew of its pendency.[37]

Whenever Porrata felt he had a real interest in any pending proceeding, he promptly sought intervention under the provisions of the Code of Civil Procedure (Sec. 72, *supra*).

(a) For instance, when no inventory of the assets and liabilities of the estate were extrajudicially available from the then executor, whom respondents thought was the one primarily bound to furnish it, co-heir Adrián Mercado Riera brought a special proceeding allowed by the insular Civil Code, ed. 1930, Sections 964 to 988. Under those provisions of the Civil Code, any heir has the absolute right to accept an inheritance on benefit of inventory by requesting also that the *preparation of an inventory* be judicially compelled. Through such proceeding ₱1213, an order was secured from the Ponce District

[36] See footnote 13.

[37] Ponce District Court's journal entry of November 17, 1941, shows that during hearing of case for delivery of estate to heirs Attorney Molina for the ex-executor, left courtroom for San Juan, and then, "upon the request of attorney Pedro M. Porrata," hearing was continued to November 21, 1941 (R. 365 bot., 366).

Court requiring Mario Mercado Riera, now co-petitioner, to bring into court a statement of assets and liabilities of decedent permitting the formulation of an inventory that might apprise the heirs as to the real status of the estate (R. 100, 774, 780). In this proceeding, petitioner Porrata saw fit to intervene by claiming that he, not the executor, had the exclusive right to prepare such inventory (R. 916 bot.). His contention was denied and a writ of certiorari issued at his instance was promptly quashed and the order of the Ponce District Court requiring the then executor to supply the inventory was upheld (see *Porrata v. District Court*, 53 P. R. R. 141, 142 mid., 147 bot., 148; 152 F. 2d 89, col. 2; R. 917). It thus appears that Porrata's intervention in ‡1213 became obstructive as entailing unnecessary outlay and protraction. He did nothing towards framing an inventory or to speed up hereditary matters, during his incumbency up to September, 1939, or otherwise (R. 116, 119). Appropos of this, the insular Supreme Court, upon April 29, 1938, entered this admonition: "The commissioner should, to avoid expense and a duplication of inventories, join in the proceedings wherein, at his own request, he was allowed to intervene" (R. 856, 863; 53 P. R. R. 140, 148).

(b) A new attempt by petitioner Porrata to intervene in another special proceeding in the Ponce District Court, may be seen at pages 213-215 of the Record. There he again intended to deny the then executor (1938) power to go into the preparation of an inventory, *after admitting that the latter had "not requested a judicial administration of the estate and that none of the parties interested in the executorship of the testator have asked judicial intervention"* and that *"the testamentary executor only* has the powers enumerated in articles 824 and 825 of the Civil Code" (R. 214). This additional obstructive interference and application by ex-commissioner Porrata was

denied by the Ponce District Court (R. 218 bot.). In the interest of brevity, appellees now invite attention to what has been already stated herein (*supra*, pp. 29-39) respecting the various and independent proceedings concerning decedent's estate, *including that for the purported approval of the so-called ex-commissioner's report.*

When review by certiorari was granted by the insular Supreme Court in case No. 1517, *Porrata elected to intervene* in the manner already explained herein (*ante*, pp. 19-20). He asked the Supreme Court to quash the writ of certiorari issued *"with any other proper pronouncements"* (R. 67-69). *In his answer to the said certiorari petition, Porrata virtually raised* (R. 83-96) *the same questions on the merits which had been urged by the ex-executor* (R. 65, 363). As such intervenor, Porrata submitted to the jurisdiction of the Supreme Court of Puerto Rico, accepted the case and its return on certiorari as it stood, and could not urge dismissal of the proceeding.[38] July 14, 1943, the local *Supreme Court entered its judgment*, vacating the order of the Ponce District Court in No. 1517, and *ordered only* the ex-executor, *Mario Mercado Riera, petitioner on this record, to deliver the estate to the heirs and to render them supplemental accounts* (R. 121; petitioners' brief, p. 50 top).

As above indicated, petitioner Porrata, the ex-commissioner for partition, stated under oath in the Supreme Court that he *did not have "any of the properties of the estate in his possession" and had no objection whatsoever "to have them administered by * * * the four co-heirs, as provided by the judgment of this Supreme Court"* (R. 141 mid.). Moreover, the said judgment of the local Supreme Court in Certiorari No. 1517, *in no manner requires or directs petitioner Porrata to do anything; it expressly concerns petitioner Mario Mercado*

[38] See footnote 17 and cases (*ante*, p. 20).

Riera, who withheld the estate from the heirs after the expiration of the executorship and who was by law bound to render them the usual accounts. Therefore, it is no wonder that, *though Porrata is apparently asking for review of the judgment in No. 1517* (R. 121), as affirmed by the Court of Appeals, he is practically relying on certain EXCERPTS IN THE OPINION rendered by the Supreme Court of Puerto Rico.[39] Those findings the local Appellate Court was required to make upon the issues raised by intervenor Mario Mercado Riera (R. 65-66, 363), now petitioner, who also urged for consideration the matter concerning the alleged draft of partition. That is why respondents have stated before (*ante,* p. 37) that the responsive action of the local Supreme Court in passing upon the questions submitted, not simply as involved in the case, *but at the further invitation of Porrata himself,* was not only correct, but produced a result as to which appellant Porrata cannot speculate or complain.[40]

In fact, petitioner Mercado's brief in the Court of Appeals (p. 13 bot.), signed by Porrata, too, as one of his attorneys, expressly recognized that:

> "In 1517, *as to appellant Porrata, the effect of the judgment appealed from is to leave him without judicial approval of payments made to him* by the executor, including, *inter alia, $20,000 for his services as* auditor-*partitioner* of the estate, and subject to an unadjudicated claim of personal liability for refund thereof to the heirs." (Italics ours.)

[39] Court's opinion does not constitute the Court's judgment, from which appeal must be taken, as rights of parties are adjudged solely by decretal portion of decree, and it is only such portion of the final judgment from which appeal would lie (*McGhee v. Leitner,* 41 F. Supp. 674, 675; *Certain, etc., Corp. v. Wallinger,* 89 F. 2d 427, 429, col. 2; *Herb v. Pitcairn* (1945), 89 L. ed. (Adv. Ops. pp. 481, 486).

[40] See footnote 28 and cases.

But that judicial approval is to be sought, conformably to the compromise agreement of the coheirs (R. 542 bot., 102 mid., 931 mid.), through the rendition of final or supplemental accounts to the heirs and if objected to, by submittal of the accounts and objections to a competent court for decision. *The so-called judicial approval is not in issue*[41] on this record, and *in no way concerns Porrata. It is a matter exclusively between the ex-executor and the coheirs.* It should also be noted that the alleged $20,000 fee *was paid to Porrata* by the ex-executor on November 17, 1941, which amount he evidently received without then caring for any "judicial approval" (see petitioners' brief, p. 52, lines 8-20). The original entry of such payment to Porrata appears in quarterly supplemental accounts (October 24, 1941 to January 31, 1942), extrajudicially rendered by the ex-executor to his coheirs Adrián, María-Luisa and Margarita Mercado Riera, which were included in the "*Final Supplemental Accounts* from March 5, 1940 to August 31, 1943," served by petitioner Mario Mercado Riera on his coheirs the 9th of September, 1943 (see Sub-Appendix A-1).

The foregoing plainly shows that appellant *Porrata's sole interest, as an intervenor in No. 1517, is in the effect of the decision* therein as a precedent in possible future litigation among the coheirs, *concerning the new final supplemental accounts from March 5, 1940 to August 31, 1943.*

That is why the Circuit Court of Appeals, as to petitioner Porrata, held that (R. 931-932):

> "His presence here is not easy to understand. In the first place *it does not appear that he has*

[41] Points not involved or raised below cannot be urged on appeal (*Supreme Forest, etc., v. City of Belton*, 100 F. 2d 655; *Mauro v. Rodríguez* (P. R.), 135 F. 2d 555, col. 1 mid.; *Helvering v. Tex-Penn. Oil Co.*, 81 L. ed. 755, 766, col. 2 mid.; *Helvering v. Minn. Tea Co.*, 80 L. ed. 284.

any financial interest in any phase of the litigation before us on these appeals. His fee was agreed upon in the contract of compromise, and the appellees say in their brief and *Porrata admitted in argument before us, that this fee has been paid in full.* **Furthermore, if there is any question of fees in** the background, *the accounting proceeding, not this, would be the appropriate place to settle it.*

"In the second place *Porrata is not officially affected by the judgments* rendered by the court below. • • •

"Apparently, however, *Porrata's concern is not so much with the judgments of the court below as with statements in the opinion.* • • •

"• • • *But the short answer to Porrata is that* only final decisions of the Supreme Court of Puerto Rico are reviewable by us on appeal (§128 of the Judicial Code: 28 U. S. C. §225) and *the final decisions of the court below are embodied in its judgments, not in its opinion, and its judgments as we have shown, do not affect Porrata.* His fear **that the above statements may be used against** him in future independent litigation • • • *does not give him standing to appeal. Boston Tow Boat Co. v. United States,* 321 U. S. 632."

Mercado Riera v. Mercado Riera, 152 F. 2d 87, 96, col. 2, bot., 97.

In the *Boston Tow Boat Co. case, supra,* this Court recently dismissed an appeal, after holding that an intervenor *whose only interest is in the effect of the decision* as a precedent in similar litigation by which it is directly affected, has no such an independent right which is violated by the decision, as to entitle intervenor to take a separate appeal. *Boston Tow Boat Co. v. U. S.,* 88 L. ed. 975, 997, 321 U. S. 632.

And even for purposes of determining the jurisdictional amount in appellate proceedings, *only claims directly in issue,* and not incidental or collateral matters, as those raised by petitioner Porrata, may be considered.[42]

III.

No federal question was properly raised in, or ever passed upon by, the insular Supreme Court below. Hence, none should be reviewed here. Yet, petitioners were amply heard (Petitioners' brief, Points I, III).

In cases #1516 and #1518, petitioner Mario expressly recognized and invoked the Supreme Court's jurisdiction to pass upon the merits of the controversies, *without raising any constitutional or other federal point* (R. 17-18, 179-180).

As respects the petition lodged by respondents in the Ponce District Court for the surrender of the estate to the heirs and rendition of supplemental final accounts (R. 49, 98 mid., 348-358), petitioner Mario Mercado Riera, the ex-executor, answered on the merits to the petition for surrender of assets without urging any constitutional or other question of a federal character *in the court of first instance* (R. 49 mid., 105-106, 363). When the local Supreme Court granted review by *certiorari in No. 1517* (R. 59), petitioner Mario Mercado Riera, after securing leave to intervene, filed his intervention and moved that the writ issued be set aside on practically the same grounds which he had raised in his answer before the Ponce District Court, and prayed for any "*other pro-*

[42] 4 *C. J. S.*, Sec. 80, pp. 170, 171; *Abadie v. U. S.*, 149 U. S. 261, 37 L. ed. 723; *Cameron v. U. S.*, 36 L. ed. 1077, 1078, col. 2; *Opelika City v. Daniel*, 109 U. S. 108, 27 L ed. 873; *New England, etc., Co. v. Gay*, 145 U. S. 123, 130, 36 L. ed. 646, 648, col. 2.

nouncements that" the insular Supreme Court *"may deem pertinent"* (R. 65, 66, 363). Therefore, the ex-executor did not object to the P. R. Supreme Court's jurisdiction, *nor did he raise any federal question at all.*

Petitioner Porrata, the ex-commissioner for partition, though with knowledge (R. 365 bot., 366) of proceeding for the return of the estate to the heirs, in the Ponce Court, *did not choose to intervene therein under Section 72, Puerto Rico Code of Civil Procedure, ed. 1933,* if he felt in any way interested in the case, *plainly because such proceeding was not directed against Porrata,* but only against the ex-executor Mario Mercado Riera (R. 98 mid., 358 bot.)[43] Had Porrata kept out of *Certiorari No. 1517* in the local Supreme Court, *as undoubtedly he could have done,* no complaint from him would be forthcoming now, as he would have been a stranger to the proceeding. *Carreras v. Brunet,* 47 P. R. R. 420; *Fed. Land Bank of Baltimore v. Court,* 45 P. R. R. 201 mid.; *King v. Fernández,* 30 P. R. R. 558 near bot.

But Porrata, having advised that there had been no service on him of certiorari petition (#1517) for the return of the estate, such service was made on April 22, 1943 (R. 62, 63). However, even one who has the right to intervene is under no obligation nor can he be compelled to do so. *Interventions are in there voluntary. Adler v. Seaman,* 266 Fed. Rep. 828, 829; *Bennett v. Kiber,* 76 Tex. 385, 13 S. W. 220; *Leaver v. K. & L. Box and Lumber Co.,* 6 F. 2d 666, 667, col. 1 bot. Notwithstanding, then Porrata filed in the insular Supreme Court a so-called special appearance[44] substantially setting forth that for the Court to pass on questions concerning the commissioner's alleged duties and functions as such, he should

[43] See footnotes and cases at pp. 14-15, *ante.*

[44] See footnote 16 (*ante,* p. 19).

be heard, as that would affect rights pertaining to his office without due process, in alleged violations of the Organic Act and the federal Constitution, without specifying the legal provisions thereof supposedly involved. Thereupon, Porrata prayed that the writ of certiorari issued be quashed *"with any other proper pronouncements"* (R. 67-69). But, concomitantly (May 24, 1943), *Porrata lodged an answer to the certiorari petition, in the territorial Supreme Court, joining issue on the merits and urging practically the same points or objections which had been raised by the ex-executor Mario Mercado Riera* (R. 83-96, 65).

The printed record thus positively shows that ex-commissioner Porrata, co-petitioner here, by his voluntary intervention[45] in the insular Supreme Court, also accepted and invoked its jurisdiction and powers on the merits (R. 83-96), to set aside the writ of review issued and to enter *"any other proper pronouncements"* (R. 69), *thus inviting action and rulings by the local Supreme Court,*[46] *with jurisdiction over the parties and the subject-matter. Porrata further argued his case at the hearing before the insular Supreme Court through counsel* (R. 96 bot.). In this connection, the Court of Appeals found that petitioner Porrata was "allowed to intervene" and *"filed an answer* to the petition for certiorari" in the territorial Supreme Court, "and also" a brief in support thereof, "and his counsel was heard orally" (R. 921 mid.; 152 F. 2d 91, col. 2 bot.). Hence, *it is undeniable that petitioner Porrata was amply heard in all respects.* That is sufficient reason, in addition to what has already been stated, why the cases of *Coe v. Armour Fertilizer Works*, 59 L. ed. 1027, 1032, and *Saunders v. Shaw*, 61 L. ed. 1163, cited in petitioners' brief, pp. 57, 59, are not

[45] See footnote 17 (*ante*, p. 20).

[46] See footnote 28 (*ante*, p. 39).

analogous nor applicable here. In neither of those cases are there facts and circumstances such as those existing in certiorari proceeding No. 1517 herein, where *Porrata, through his own voluntary intervention in the local Supreme Court, was accorded full hearing and argument, though he never had been a necessary party in the court of first instance, because the proceeding was not directed nor was judgment demanded against him* (*supra*, p. 29).

Petitioner said below that the matter of the insular Supreme Court's jurisdiction to grant certiorari was raised in the answer of Porrata to the certiorari petition in case No. 1517. But even a superficial examination of such answer, paragraphs 20 and 21, will show Porrata's assertion to have been that the *District Court of Ponce had jurisdiction* in the matter. *In no part of Porrata's answer, is to be found any challenge against the local Supreme Court's jurisdiction in certiorari proceeding No. 1517* (R. 83-94). To the contrary, Porrata prayed that the writ of certiorari allowed by the P. R. Supreme Court be quashed *"with any other proper pronouncements"* (R. 69 top). Through his voluntary appearance and intervention in the Supreme Court below petitioner Porrata submitted to its jurisdiction, which clearly existed under the local Certiorari Act of 1904 (*ante*, pp. 19, 43). As then intervenor, Porrata also accepted the case as it stood, and was precluded from urging dismissal of the proceeding.[47] The insular Supreme Court, having complete jurisdiction over the subject-matter and all the parties, duly entered its judgments.

The foregoing considerations exhibit that the so-called "constitutional or federal questions" in the local Supreme Court, alluded to by petitioners, are really fantastic.

In fact, petitioners' pleadings in Puerto Rico, as above indicated, did not even refer to *Section 40* of the *Organic*

[47] See cases and footnote 28 (p. 39, *ante*).

Act of Puerto Rico (1917), nor to *Section 33* of the earlier Organic Act of 1900 (*Foraker Act*), *nor to General Order No. 118* of the Military Government of Puerto Rico.

That is why, among other reasons, the insular Supreme Court did not, and could not have passed upon any such imaginary federal questions as petitioners insist on here. And, naturally, if no provision of the Organic Act of Puerto Rico was considered or determined by the territorial Supreme Court below, *it follows that no federal questions should be considered now, much less as of a substantial character*, on which jurisdiction here could be predicated.[48]

Remington Paper Co. v. Watson, 43 L. ed. 762, 765, col. 1. mid., was a case where it was objected that the record presented no federal question. This high Court said:

> "The action was regularly proceeded with, and was determined against plaintiff in error on grounds which did not involve Federal questions, and therefore *it is not within our power to review the judgment of the supreme court of the state.*
>
> "The plaintiff in error thus sought in the state court and was given opportunity to litigate the rights claimed by it and it cannot complain that the guarantees of the Constitution of the United States were denied because the litigation did not result successfully. • • •
>
> "It follows that this writ of error cannot be mantained."

For that and other reasons, respondents have moved for dismissal of the petition for certiorari herein (see Appendix A).

---

[48] *Succ'n of Tristani v. Colón* (P. R.), 71 F. 2d 374; *Martinez v. Sancho* (P. R.), 108 F. 2d 960, 961; *Stewart v. Kansas City*, 60 L. ed. 120; *Fleming v. Fleming*, 68 L. ed. 547, 549, col. 2; *Kammerer v. Kroeger*, 81 L. ed. 254, 255; *South Bell Tel. Co. v. Okla.*, 82 L. ed. 752, 755; *Patterson v. Gas Co.*, 83 L. ed. 231, 233.

In these cases, appeals were dismissed for lack of appellate jurisdiction or as not raising substantial federal questions.

IV.

The insular Supreme Court had jurisdiction on certiorari to review proceedings in Nos. 1516, 1517 and 1518, and to affirm or vacate and grant appropriate relief (Petitioners' brief, pp. 33-39).

In their supporting brief (Point II), petitioners state that, on certiorari, the local Supreme Court "had no power to go further than to vacate" the orders reviewed. In support of that ungrounded assertion, reference is made to *National Surety Company v. Rossy* (1913), 19 P. R. R. 897. In that case, the only question directly involved and decided was that the overruling of a motion for removal of a cause to the federal court, did not amount to an infraction of any law of procedure and that, therefore, the Certiorari Act of 1904 could not be invoked. There was no occasion for granting any other relief there, as the order under review was not vacated but, on the contrary, the writ issued was quashed. Hence, any other statement therein is mere *dictum*.

This particular point and, in fact, none concerning the local Supreme Court's powers, was ever raised in the Puerto Rico Supreme Court (*ante*, p. 18).[49] Even if it had been so urged there, it could not be reviewed here for lack of appellate jurisdiction (see Appendix A). Though petitioner Porrata announced his intention to move for a reconsideration in ₱1517 (R. 122), and certain time was allowed him therefor (R. 123), no rehearing was asked either by him or by petitioner Mercado in the local appellate tribunal. It was only in certiorari ₱1516 (claim for alleged fees), that a rehearing was applied for by Ochoteco and Zapater (R. 33)—not appellants here—

[49] Point not raised in lower court cannot be urged as error on appeal (*Baetjer v. U. S.*, 143 F. 2d 392, 397, and see other cases in footnote 41) *ante*, p. 52.

which motion was denied by the insular Supreme Court. And even there, the Court's power, in its discretion, to order delivery of the estate to the heirs (Case No. 1517), was not questioned (R. 33, 36-37).

The wide latitude and discretion with which the insular Supreme Court is vested by the local Certiorari Act of 1904, has already been considered herein (*supra,* 41-46). It has also been shown (*ante,* pp. 16-19; 21, 39) that, under the territorial Certiorari Law of 1904, the Court is empowered to *complete proceedings when a Trial Court refuses to do so upon erroneous grounds;* and, evidently, that is the usual and only course to follow when, as here, the parties have united in presenting to the Supreme Court below, with jurisdiction over the case and parties, all questions thought to arise upon the record, particularly when the litigation already has covered a considerable period[50] and all facts and evidence, almost wholly documentary, were sent up to the reviewing Court as part of the return (R. 59, 187-189).

As a matter of local practice and procedure, upon vacation of an order reviewed by certiorari, the insular Supreme Court is empowered, under the Certiorari Act of 1904 (Art. 670, Code of Civil Procedure, ed. 1933), to complete proceedings by granting appropriate relief. This has often been done, in the exercise of its sound discretion, by the local Supreme Court.[51]

---

[50] See *Cole v. Ralph,* 64 L. ed. 567, 574, col. 2 mid., where the U. S. Supreme Court states that, on certiorari, "it may proceed itself to a complete decision."

[51] *Padilla v. Justice of Peace,* 35 P. R. R. 276, 282 top (judgment on certiorari modified and affirmed on appeal). Among other cases, see: *Santana v. Court,* 55 P. R. R. 419, 421 mid. (order vacated and a new one made); *Mercado v. Corte,* 62 D. P. R. 369 mid., 391 (judgments vacated and relief granted); and see *Ballester v. Tribunal de Apelaciones,* 61 D. P. R. 475, 512, Spanish edition (relief by modifying judgment), and *Buscaglia v. District Court, etc.* (C. C. A., 1st

The obviousness of this point prompted the Court of Appeals to state that: "Clearly this statute [local certiorari act] gives the Supreme Court of Puerto Rico jurisdiction * * * in certiorari to order the inferior court to complete proceedings when it refuses to do so upon erroneous grounds"; and further that the higher court in Puerto Rico "clearly has jurisdiction," "upon reversal on certiorari, in a proper case to order entry of a new order * * *" (R. 924 bot., 925 bot.). *Mercado Riera v. Mercado Riera,* 152 F. 2d 93 mid. (footnone 8). Whether final appropriate relief is given by an appellate court, or on remand by a Trial Court, is immaterial as in either case the litigation is finally terminated between the parties on the merits, leaving, in any event, nothing for the Trial Court to do but the ministerial act of following the higher court's instructions. *Buscaglia v. District Court,* 145 F. 2d 275, 282, col. 1 mid.; *Chesapeake and Potomac Tel. Co. v. Manning,* 46 L. ed. 1114, 1146; *Gulf Ref. Co. v. U. S.,* 70 L. ed. 196.

And, of course, the action of the Supreme Court of Puerto Rico in disposing of the case as it did in Certiorari No. 1517 (R. 121), when the questions, parties and all the evidence were before it, was a discretionary matter of purely local law, which should always be accorded the greatest weight (*Diaz v. Lugo,* 67 L. ed. 550, 552; *P. R. v. Rubert Hnos.,* 86 L. ed 1081, 1088, col. 2 mid.; *De Castro v. Board of Commissioners,* 88 L. ed. 1384, and see other cases cited *ante,* footnote 18).

Cir.), decided October 24, 1944, 145 F. 2d 275, 282 (where Puerto Rico Supreme Court, under 1943 Certiorari Act, gave relief *by restoring* District Court's restraining order and remanding case, which was construed here, on appeal, as finally terminating litigation on merits); *Bd., etc., v. State Bd.,* 1 Cal. 2d 784, 37 P. 2d 84, 96 A. L. R. 775 (Court, having all facts before it, may give appropriate relief).

V.

Concise response to some other minor questions of local law.

A. *The Ponce District Court overreached its powers in holding that decedent's estate was in custodia legis "without any judicial administration having been decreed."*

Petitioners hesitatingly, though argumentatively and quite erroneously, intimate (Br. p. 38 mid.), that the local Supreme Court suggested the District Court of Ponce was "without jurisdiction" over the Mercado estate. This amazing statement is without warrant on this record. It is likely due to misinformation regarding Puerto Rican law and procedure. Otherwise, the statement would be inconceivable. A careful reading of the decision of the Supreme Court of Puerto Rico in No. 1517, demonstrates that the finding as to *absence of a judicial administration* was that:

> "• • • Neither within the proceeding regarding letters testamentary nor within the beneficiary acceptance proceeding did the estate of Mario Mercado Montalvo ever become a judicial administration, and, as the executorship had expired, it devolves upon the heirs to execute the will of the testator regarding any particular where the executor has failed to act.
>
> "In our judgment, the lower court *exceeded its jurisdiction,* when holding that the hereditary estate was under custodia legis, without any judicial administration having been decreed • • •" (R. 104 bot., 120 mid.).

This, of course, meant that the Ponce District Court procedurally overreached its powers in attempting to exercise general jurisdiction over the whole estate, as if

it were in *custodia legis* or under a judicial administration in one single testamentary case, when the fact was and is—and the contrary is not even contended by petitioner here—that *no judicial administration had ever been sought or decreed* concerning the Mercado estate. Under such circumstances, according to Puerto Rican law and procedure, a testamentary executorship is regarded as one of an *extra-judicial* nature, *without court intervention or custodia legis over the estate,* except regarding such separate and independent actions or proceedings which may arise and are provided for by the local civil or procedural code. This is so plain that even petitioners here have felt constrained so to acknowledge in their brief, p. 36 top, where it is conceded that under the circumstances pointed out, "the only available remedy would be by the *institution of independent actions* at law by creditors or others interested in the properties; *or by one or more of the heirs against the others if they could not wholly agree among themselves* (Italics ours). That is why respondents have hereinbefore set out the various and separate judicial proceedings instituted concerning decedent's estate, showing the legal source, grounds, aims and conclusions of each matter (*ante,* 28-37). Naturally, the independent purpose and character of each proceeding cannot in any way be affected under local practice, by the title or caption in the petition, including its filing number, whose object is to facilitate identification, as the facts stated in complaints, not their captions, determine the nature of the action or proceeding. See 49 C. J. 130; *The Juncos Central Co. v. Rodríguez,* 16 P. R. R. 286, 292; *Rodríguez v. The San Juan Fruit Co.,* 60 D. P. R. 437, Spanish edition.

Co-petitioner Porrata also admits that testator provided in his will "everything that is necessary for an *extraju-*

dicial liquidation," "which always is beneficial to the heirs, legatees and creditors of the estate" (R. 799 near bot.).

Petitioners even conceded, in their Statement on Appeal below (p. 31 mid.)[52] that if this were properly to be considered as a private independent Civil Law executorship, to be carried on under the testator's will, then there appears to be "SUBSTANTIAL CIVIL LAW AUTHORITY IN THE DECISIONS OF THE SUPREME COURT OF SPAIN AND IN THE WORKS OF THE COMMENTATORS OF THE SPANISH CIVIL CODE, FOR HOLDING, AS THE INSULAR SUPREME COURT DOES, THAT THE EXECUTOR'S TERM OF OFFICE ACTUALLY EXPIRED OF SEPTEMBER 2, 1939, TWO YEARS AFTER HE FIRST TOOK OFFICE, DESPITE THE TESTATOR'S EXPRESS DIRECTION IN THE WILL THAT THE ONE-YEAR TERM GRANTED HIM BY SECTION 826 OF THE CIVIL CODE FOR EXECUTING HIS OFFICE SHALL BE EXTENDED FOR 'ALL THE TIME THAT MAY BE NECESSARY.'" (Emphasis supplied.)

And, as to Certiorari No. 1517, the Supreme Court of Puerto Rico clearly explains that due to Sections 832 and 833 of the local Civil Code, ed. 1930, it was necessary, when the executorship expired and there was refusal to return the estate to their heirs, to judicially compel the ex-executor so to do, as upon the expiration of the incumbency, "the execution of the will of the testator shall devolve upon the heirs" in case anything remains to be done (R. 114, 120 mid.). And the petition for surrender of the estate to the co-owners, arising under Sections 832 and 833 of the insular Civil Code, ed. 1930, as the local Supreme Court held, initiated a special proceeding, separate and complete *per se,* from the petition down to final judgment in the Ponce district tribunal, with subsequent review by certiorari in the local Supreme

[52] This has been additionally certified to supplement the record here, by the Clerk of the Court of Appeals.

Court (*ante,* 12-21) and affirmance by the Court of Appeals (152 F. 2d 86).

B. *District courts in Puerto Rico are not divided into probate and civil sides.*

Petitioners' brief, p. 45 bot., states that Puerto Rican courts have general jurisdiction "over surrogate proceedings."

At the threshold, this statement must be clarified. The District Courts in Puerto Rico are courts of general civil jurisdiction (*Oronoz v. Román,* 26 P. R. R. 22, 26; *Coll v. Rigo,* 16 P. R. R. 562); and, as in Louisiana, also a civil law state, courts are not divided into probate and civil sides (see *Succ'n of Kelley,* 102 So. 678, 157 La. 585).

C. *Meaning of "perfecting" (formalizar) the so-called "draft of partition," within the compromise agreement.*

Petitioners say (Br. 47 bot.) that the local Supreme Court instead of using the word "*prepare*" adopted the word "*perfect*" in connection with the draft of partition (R. 103, last par.), which petitioners insinuate is not warranted. The fallacy of this position is obvious. It cannot be gainsaid that the Spanish text of the compromise contract, clause 3, paragraph (m), insofar as now pertinent, reads "Dicho Don Pedro M. Porrata • • • se compromete a *tener formalizado* el aludido cuaderno particional • • •." The Supreme Court below considered the compromise agreement as originally written by the parties, *i.e.,* in Spanish, and in referring to said paragraph (m), simply used the word "*formalizado*" (*Mercado v. Corte,* 62 D. P. R. 375 bot., Spanish edition). Now, the word "*formalizado*" appears translated in the record as "prepared" (R. 545, line 4). The difference between the Spanish words "preparar" and "formalizar," is that the latter implies something more complete

or perfect. For instance, in the *New Velázquez Dictionary*, 1st. ed., Spanish-English (p. 326), the word "*formalizar,*" used by the parties in the compromise agreement and considered by the Island's Supreme Court, is thus defined: "*to form or make complete or perfect.*" The *Enciclopedia Juridica Española* (Vol. XVI, p. 502) informs that "*formalizar*" is to give the last shape to something or to surround it with legal requirements ("dar la última forma a alguna cosa o revestirla de los requisitos legales"). Therefore, it is clear that whether the word "prepare" or "perfect" is employed in English, it is immaterial on this record, as the insular Supreme Court, in its decision, used and considered the words "*tener formalizado,*" which the parties themselves inserted in the original Spanish text of the aforesaid compromise agreement.

D. *Time allowed Porrata to present a partition deed under the compromise contract.*

Petitioners also refer (Br. p. 41) to clause (m) of the compromise agreement which required Porrata to have furnished the coheirs with a final draft of partition deed "*within a term of 10 days from the payment of inheritance tax.*" Of course, the words "*inheritance tax*" only referred to the Puerto Rican estate tax. That is so, not only because of the expression "inheritance tax" in singular, but further because the federal estate tax is inapplicable to Puerto Rico estates under the explicit enactment of *Section 9, Organic Act* of 1917, providing that the statutory laws of the United States not locally inapplicable, shall extend to Puerto Rico, *except the internal revenue laws.*[53]

[53] In *Piacentini v. Buscaglia*, 59 D. P. R. 782 mid., Spanish text, it 's also said that the federal estate tax is inapplicable to Puerto Rico. However, this part of the opinion has been inadvertently omitted from the English text in 59 P. R. R. 777 mid.

On this minor point, the Circuit Court of Appeals stated:

> "It appears that the executor did not file any notice of decease with the insular taxing authorities until May 3, 1939, although under the tax law he is allowed only 180 days in which to do so, and an inheritance tax receipt dated March 9, 1940, shows that he did not pay the inheritance tax until February 29, 1940" (R. 919 bot.; 152 F. 2d 91, col. 1 top).

Moreover, in passing on the ex-executor's accounts to the heirs, a different and separate proceeding which appellees set out *supra*, pp. 31-34, Judge Sepúlveda of the Ponce District Court, upon February 19, 1942, rendered a decision. There, Judge Sepúlveda held that the federal tax controversy did not prevent in any way the use of monies possessed in Puerto Rico, as the "transfer certificate (Exhibits Nos. 42 and 43) from the Federal Internal Revenue Bureau shows that the only sum which was not available to the estate, by reason of the Federal tax controversy, was the sum of $200,000 located in the City of New York, U. S. which were deposited in the National City Bank, and which were not available unless a release or transfer certificate were previously obtained from the Government. Therefore, the Court is of the opinion and so orders, that the sum of $2,102.98 of unnecessary interest paid by the executor on the first installment of aforesaid testamentary legacies, should be transferred to the assets of aforesaid final account" (R. 406, pars. 3 and 4). Even the ex-executor, now petitioner in his answer to the objections urged against his final accounts to March 4, 1940, admitted that the Federal Internal Revenue Bureau decisions on the so-called federal tax controversies, was "favorable to the estate" (R. 281, line 12), that is, that the federal estate tax, as part of the U. S. Internal Revenue Code, was not ap-

plicable to Puerto Rico in view of Organic Act (1917), Section 9 above referred to.

Under Act No. 99, on insular inheritance tax, *Section 5* (Laws of 1925, p. 795, as amended by Act No. 34, of July 22, 1935, Extra Session Laws 1935, p. 423), it was the duty of every executor to transmit to the Treasurer of Puerto Rico, *within 60 days after the decedent's death* (testator's death occurred August 22, 1937), "a sworn notification of the death of said decedent, stating plainly: * * * as nearly as possible, the amount, valuation, description and location of the estate of the decedent," etc.; and any executor failing to file such notification within the period specified, "shall be deemed guilty of misdemeanor * * *."

Section 9 of that local inheritance tax act, as amended April 27, 1933 (Laws of 1933, p. 234), grants 180 days of grace from decedent's death, before interest at 1% per month accrues on any estate tax due. And Judge Sepúlveda, then of the Ponce District Court, in his decisions on the accounts, further held that the Treasurer of Puerto Rico collected $26,904.58 of interest on the local inheritance tax on the Mercado estate, due to the fact that the 180 days of grace granted by law, expired counting from the death of testator on August 22, 1937, that is, for a period of two years and 11 days during which Mario Mercado Riera "failed to file his notification of decease of the testator and to pay the corresponding inheritance tax" (R. 146 mid.).

When the compromise agreement was executed on September 9, 1938, in view of the then executor's failure in that respect, in contravention of the cited provisions of local law, the co-heirs agreed with the then (1938) executor, now petitioner Mario Mercado Riera, upon a short term of 10 days from the date of the compromise contract, for him to comply with his legal duty to serve

notice of death (local estate tax return) of testator upon the Treasurer of Puerto Rico; and on liquidation thereof, to pay the inheritance tax (R. 543 mid., 102 bot.; *ante*, p. 10). In the independent litigation regarding the accounts, rendered by petitioner Mario Mercado Riera as alleged "executor" (R. 234), not as "judicial administrator," Judge Sepúlveda also dismissed an alleged excuse urged by the ex-executor for not complying with the compromise contract on that point and ordered him to make restitution to appellees of $13,452.29, as interest tardily and improperly paid for their account regarding the local inheritance tax (R. 416-418 mid.; see *supra*, p. 35).

That is one of the reasons why co-petitioner Porrata, *as* (1938) *testamentary partitioner* (R. 527 mid., 545), accepted and agreed to prepare or perfect (*formalizar*) a draft of partition "*within a term of 10 days*[54] *from the payment* of inheritance tax in this case and *in accordance with the provisions of the present contract,*[55] which cannot be altered except with respect to the description of the properties or goods of the estate, nor modified, added to or amplified in any manner whatsoever * * *" (R. 545, 103 bot.).

As just stated, the compromise agreement obligated Porrata, as then (1938) commissioner for partition, to have prepared or perfected the draft of partition to be executed by him and the co-heirs, *within a term of 10 days from the payment* of the inheritance tax (R. 527,

---

[54] As a matter of law, time is of essence of contracts (particularly in view of the short and precise terms fixed in the compromise agreement, etc.) (*McFaddin Rice Milling Co. v. Maldonado*, 31 P. R. R. 450, 456 mid., par. 2; *Meier Dental Mfg. Co. v. Smith*, 237 Fed. Rep. 568 top; *Owen v. Giles*, 157 Fed. Rep. 825, 829; *Emerson v. Slater*, 16 L. ed. 360).

[55] Mario Mercado Riera, too, thought it necessary to make "forma demand" upon ex-commissioner Porrata for him to proceed to the partition of the estate "in conformity with aforesaid contract of compromise of September 9, 1938" (R. 593 mid.).

545, line 5). This also appears from petitioners' brief (p. 41), where the unwarranted impression is given that the 10 days should be counted from March 9, 1940, which was merely the date of the tax receipt (R. 583). But the authentic tax receipt itself, undoubtedly shows that the inheritance tax was *"paid February 29, 1940"* (R. 583 near bot., line 25). This is also admitted by the ex-executor (R. 276 bot., par. B), and it is further so recognized in the opinion by Judge Sepúlveda on the accounts, included in the record by petitioners (R. 416, par. 4). The testamentary offices of executor and partitioner expired on September, 1939, as held by the local Supreme Court, affirmed by the Court of Appeals (R. 112, 115). But even if the contrary be assumed, the proposed draft of partition was extemporaneously[56] sent to the heirs by the ex-partitioner on or after March 14, 1940 (R. 597 bot., 598, 603, 604 bot.). In view of that situation, the objecting heirs, now respondents, advised ex-commissioner Porrata that the compromise contract with attached inventory had been "placed in a notary's protocol, in conformity with the provisions of paragraph (p), 3rd clause, of the aforesaid contract" (R. 604 bot., 605). Paragraph (b), 3rd clause of the compromise agreement, empowered any of the parties thereto to protocolize or incorporate the compromise agreement into a notarial instrument "for all proper purposes" (R. 546 mid.). This was done (R. 524, bot.-558) after failure by Porrata to comply with his said undertaking.

The ex-executor Mercado and the testamentary ex-partitioner Porrata, not only failed to discharge their contractual duties, *but even allowed their respective*

---

[56] Even where agency is created for a fixed period, its expiration ends the agency, though purpose not accomplished (*2 C. J. S.*, p. 1151, Sec. 71; *Smith v. Collins*, 165 Fed. 148 [sale after time limit unauthorized]; *Rundle v. Cutting*, 18 Colo. 337, 32 P. 994 [action after time limit, invalid]; see Sections 1605 and 1610, *Civil Code of P. R.*, ed. 1930; *11 Manresa, Comentarios al Código Civil* [1905], pp. 453, 454).

terms of office to expire upon September, 1939. So, the local Supreme Court declared that the obligations imposed on the then (1938) executor through the compromise contract:

> "were so conferred one year before the expiration of his term, and the short and precise terms therein fixed do not imply at all the extension of such term, but, on the contrary, that the hereditary estate should be delivered to the heirs. They apportioned among themselves the hereditary estate (subdivision [f] of the compromise contract) and the commissioner of partition, bearing this in mind, and, moreover, the fact that the heirs had 'agreed regarding the form and terms of the partition or distribution of the estate' (subdivision [1], compromise contract), likewise consented to said contract. Neither the executor nor the commissioner complied, either within the terms fixed or subsequently, with the terms of the contract • • •
>
> "If the heirs in the case at bar had already accepted the inheritance and agreed upon its distribution, pursuant to the compromise contract of September 9, 1938, the fact that the executor and the commissioner of partition had failed to perform its terms should not be ground for claiming, several years afterwards, that the heirs are not in agreement as to the way in which they should distribute the estate among themselves • • •" (R. 116, 119 mid.).

And as shown before, a voluntary distribution of the estate among the heirs, particularly if assented to by the then (1938) partitioner (R. 103, 116 top) and, specially if the partitionership was allowed to expire (R. 115), rendered entirely unnecessary any further action by the ex-commissioner (*see footnote 29*).

Additional information concerning the so-called draft of partition by ex-commissioner Porrata and the objections thereto, may be seen at pages 35-39 of this brief.

E. *Adjudication of residuary estate by heirs, precludes any partitioner's further intervention under local law.*

Petitioners' brief (p. 52) intimates that delivery of the estate should not have occurred without "a distribution of the residuary estate among the heirs" by a partition deed. Respondents fail to perceive the relevancy of this position. But if petitioners mean to convey the idea that, until a division of the estate is effected in kind, the co-heirs do not become decedent's successors in title, they are wrong.

The Mercado heirs in their compromise agreement of September 9, 1938, adjudicated or distributed the estate of decedent among themselves, share and share alike (R. 102, 116, 119 mid., 542 mid.), with the express acquiescence of both petitioners. This, they could legally do (and no objection to the contrary has been raised) because, as prescribed by *Sections 603 and 610* of the local Civil Code, 1930 ed., "the rights to the succession of a person are transmitted from the moment of his death," and "heirs succeed the deceased in all his rights and obligations by the mere fact of his death." The question, being one peculiarly concerning the applicability of the insular Civil Code, the Supreme Court of Puerto Rico construed and accepted such adjudication among the heirs as legal, unobjectionable and perfectly correct (R. 116, 119 mid.). A leading Spanish civil authority, *6 Sanchez Román* (Vol. 3), pp. 1984, 1985 mid., holds that such adjudication by and between heirs, if assented to by them, is perfectly legal. Besides, in the extemporaneous and illegal draft of partition by ex-commissioner Porrata, timely objected to on divers grounds (*ante*, pp. 37-39), *he suggested that the properties of decedent's estate be adjudicated and awarded without any partition in kind, i.e, proindiviso* (which the heirs had already done; R. 542 [f], 102, 119) "in conformity

(as stated in said draft of partition) with what is set forth in clause 3, letter F, of the Contract of Compromise of the 9th of September, 1938" (R. 757 top). And in Puerto Rico, the *mere agreement* between heirs as to the partition of the hereditary estate, is sufficient for the heirs to be immediately placed in possession thereof, *a fortiori* when, as here, the executorship and partitionship had then expired (R. 112-114, 115).[57]

F. *The doctrine of estoppel cannot be invoked by petitioners.*

Furthermore, the ex-executor himself, petitioner here, has relinquished custody of the estate, and has himself purchased from his co-heirs part of the hereditary properties (see Sub-Appendix A-I).

Reference to the doctrine of *estoppel* appears in petitioners' brief (p. 71 bot.), where §463 of the Puerto Rico Code of Civil Procedure is quoted. This section provides that "whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he cannot in any litigation arising out of such declaration, act, or omission, be permitted to falsify it." But as the points regarding the executorship and judicial administration concern petitioner Mario Mercado Riera, the first objection to that would be that nowhere in Mercado's answer for the delivery of the properties (R. 363-364) nor in his intervention in certiorari No. 1517 before the insular Supreme Court (R. 17-18), was there any defense or question raised as to "estoppel." None, therefore, can be considered on ap-

[57] See Section 604 *P. R. Code of Civil Procedure*, ed. 1933; *Pellicia v. Court*, 36 P. R. R. 588 (termination of executorship); *Ex parte Sotomayor*, 24 P. R. R. 172 (partitionship unnecessary); *Irizarry v. Registrar*, 22 P. R. R. 88 (to same effect); *Galindo y Escosura, Legislación Hipotecaria*, Vol. II pp. 257, 258 (to same effect).

pellate review. *Baetjer v. U. S.*, 143 F. 2d 392, 397; *Mauro v. Rodríguez*, 135 F. 2d 555, col. 1 mid.; *Supreme Forest, etc., v. City of Belton*, 100 F. 2d 655; *Helvering v. Tex. Penn. Oil Co.*, 81 L. ed. 755, 766, col. 2 mid.; *Helvering v. Minn. Tea Co.*, 80 L. ed. 284.

The independent nature and purpose, legal source, separate pleadings, conduct, hearings and judgment of the proceeding for the surrender of the estate to the heirs or co-owners, which gave rise to Certiorari No. 1517, have been fully set out in this brief, pages 12-22. And, of course, the clerk's filing number, as part of the title or caption in the petition, whose object simply is to permit identification, has no bearing on the separate character of such special proceeding, which is determined solely from the facts stated in the complaint or petition (see 49 C. J. 130; *The Juncos, etc., Co. v. Rodríguez*, 16 P. R. R. 286, 292 *Rodríguez v. The Sun Juan Fruit Co.*, 60 D. P. R. 437, Spanish edition).

Besides, written demand upon the ex-executor Mario Mercado Riera was repeated on September 18, 1941, where the attorney in fact for co-heirs, who are now respondents, stated: "I regret *to reiterate* the demand of my principals that you deliver to them the properties, community properties, rights and securities in the estate which belong to them and which are still, without any justification whatsoever, in your custody" (R. 588 mid.). That shows, of course, that fruitless repeated demands had preceded with the same end in view. Again, on October 25, 1941, respondents insisted as follows: "We wish to *reiterate* our many objections to your self-characterization as executor of the properties left by don Mario Mercado Montalvo, especially when you have had plenty of time to put the heirs in possession of said properties" (R. 561 mid.). Then, the ex-executor, in his answer to the petition for the de-

livery of the estate to the coparceners or hereditary co-owners, as filed by him in the Ponce District Court, expressly stated that "with respect to a delivery of the properties of the estate by the executor herein appearing, to the co-heirs, including himself as one of said co-heirs, he has always been willing and ready to do it * * *," (R. 363 mid., 105 mid.).

Furthermore, *Sections 832 and 833* of the insular Civil Code, ed. 1930, expressly declare that the executorship terminates by the lapse of the term fixed by the testator or by law and that, thereupon, the further execution of the will shall devolve upon the heirs. As held by the local Supreme Court (R. 114 mid., 120), upon the expiration of the term, the testamentary executorship terminates by *force of law* or *ipso jure*; without the necessity of any judgment nor any special order, and, thereupon, the execution of the will of the testator pertains to the heirs; and if the executor refuses to consider his commission at an end, or to deliver the properties, if any, or to render accounts, *he "may be compelled to do so by judicial means."*

It will be readily observed that the obligation to return the estate to the heirs, upon the termination of the executorship, was a duty which cannot here be easily shunned by the belated expedient (a mere afterthought) of invoking the theory of estoppel, manifestly inapplicable here. Such theory was, in consequence, repudiated by both lower Appellate Courts (R. 104, 105, 116, 119, 120, 929, 930 mid.; 152 F. 2d 86, 96).

VI.

As a matter of local law, (A) the insular Supreme Court correctly and reasonably held that the executorship expired on September 1, 1939; and that (B) no judicial administration of decedent's estate had been sought or decreed (Petitioners' brief, Point IV, pp. 62-76).

A. *The executorship legally expired on September 1, 1939.*

On this point, the insular Supreme Court, on July 14, 1943, rendered its able and painstaking opinion in Certiorari No. 1517 (R. 97-121). Among other things, the local Supreme Court states that decedent, Mario Mercado Montalvo, died on August 22, 1937, leaving a holographic will in which he named as his sole and universal heirs his four children, all of them of legal age, María-Luisa, Margarita, Adrián and Mario Mercado Riera, designating the latter as testamentary executor and "extending to him the statutory term of one year for whatever time might be necessary to perform his office" (R. 99 mid.).

After reciting the compromise agreement entered into by and between the co-heirs (R. 100-104), the territorial Supreme Court below held that the fundamental question "which is the gist of the whole controversy" is whether or not the executorship terminated by virtue of the expiration of the period which the testator or the law allowed the executor or whether the heirs, by their acts in accordance with the compromise contract, could extend said period (R. 110 top).

The local Civil Code, ed. 1930, substantially provides that the executor for whom testator has not fixed a term

must fulfill his duties within a year, counted from his acceptance (*Section 826*) that if testator desires to extend the legal term, he must *expressly* fix the time of the extension, otherwise it shall be understood that the term *is extended for one year* (*Section 827*); that the *heirs and legatees* may, *by common consent,* extend the term of the executorship for the time they may consider necessary, but if the agreement is only that of a majority, *the extension cannot exceed one year* (*Section 828*); that an executorship terminates, among other causes, by lapse of the term fixed by the testator, by law, and, in a proper case, by the persons interested (*Section 832*) *and that in the cases of the foregoing Section 832, the execution of the will of testator shall devolve upon the heirs* (*Section 833*).

It should be noted, in passing, that in the execution of the compromise agreement by and between the co-heirs, none of the legatees was a party (R. 527, 547). This means that, in absence of any of the legatees, there could be no unanimity for an imaginary extension, which, even if the co-heirs had not fixed shorter periods, could never exceed a year to expire also on September 1, 1939 (see *Alvarado v. Sucn Ortiz, et al.,* 15 D. P. R. 137; R. 112 mid.; 930 bot.).

Upon a careful consideration of the foregoing provisions of the Puerto Rico Civil Code and of Spanish Supreme Court decisions and opinions of noted law writers and commentators thereon,[58] the Puerto Rico Supreme Court, passing judgment upon those questions of purely local law and concern, held, insofar as now pertinent, as follows:

---

[58] Such as Judgment of the Supreme Court of Spain of November 24, 1906, *105 Jurisprudencia Civil,* 812, 819; *Sánchez Román, Derecho Civil,* Vol. II, p. 1450; *6 Manresa, Comentarios al Código Civil* (1932), 736; *4 Maura, Dictámenes* (Legal Opinions) 308, 309 and 351; *6 Manresa, Comentarios al Código Civil* (1932, pp. 753, 238, 239; *96 Jurisprudencia Civil,* pp. 599, 601, 602—see Record, pp. 110-115.

"We decide, therefore, that as Mario Mercado Riera was granted his letters testamentary as executor on September 1, 1937, the term of one year allowed him by Section 826, *supra,* expired on September 1, 1938, and that the additional year granted him by the testator under Section 827, *supra,* expired on September 1, 1939, when the executorship terminated pursuant to Section 832 of the Civil Code which provides that 'executorship terminates by the death, incapacity, renunciation, or removal of the executor, *and by the lapse of the term fixed by the testator, by law, and, in a proper case, by the persons interested'* (italics ours), inasmuch as there is nothing in the record to which application may be made of Section 828 of the same statute which provides that 'the heirs and legatees may, by common consent, extend the term of the executorship for the time they may consider necessary, but if the agreement is only that of a majority, the extension cannot exceed one year' (R. 112 mid.).

"The lower court, therefore, erred in holding that the expiration of the term of two years provided in the Civil Code for a case like the one at bar 'does not terminate the executorship' • • • (R. 112 bot.).

"• • • we cannot disregard the provisions of Section 828 of the Civil Code, and, *as the legatees have not intervened in any way in said compromise contract, the latter cannot, by judicial construction, operate as extending the term of the executor.* On the contrary, *if we pay attention to the short and precise terms fixed by the heirs* so that the executor could perform his duties as such, *it cannot be construed as an indefinite extension,* as claimed by the executor. Moreover, *at the time of the execution of said compromise contract, September 9, 1938, the executor still had one year for the fulfillment of his office,* which did not expire until September 1, 1939. *We cannot logically construe the contract as an indefinite and indeterminate extension of the executorship* (R. 113 top; 930-931; 152 F. 2d 96, col. 2).

"* * * as no agreement whatever has been shown between the heirs *and the legatees,* and, as the heirs did not constitute a majority, such conduct cannot either be construed as amounting to the granting of any of the extensions provided for in Section 828, *supra* * * * (R. 113 mid.).

"* * * In his commentaries on Section 910 (equivalent to Section 832 of P. R. Civil Code, ed. 1930) and the judgment of October 6, 1897, *supra,* Manresa says:

> "'Upon the expiration of the term fixed by the testator or by law, in a proper case, the extension granted by the testator himself, by the heirs and legatees, or by judicial authority, terminates *ipso jure* the executorship, *even though he may not have terminated his commission.' 6 Manresa, Comentarios al Código Civil* (1932), 753.

"On pages 238 and 239, he says:

> "'Upon the expiration of the term and the extension or extensions, in a proper case, the testamentary executorship terminates by force of law, without the necessity of any judgment or any special order, as set forth in Section 910, and the execution of the will of the testator devolves upon the heirs, according to Section 911.'
>
> "'If the executor refuses to consider his commission as terminated at the expiration of the term or to deliver the properties, if any, or to render accounts, *he may be compelled to do so by judicial means.'* (Italics ours.) (R. 114.)

"Nor can it be maintained that the term of the commissioner (Record contains 'executor' because of clerical mistake in translation) is still in force and that the partition should be made in accordance with the draft of partition prepared by him. As we have stated, the commissioner (Record contains 'executor' because of clerical mistake) in the present case was granted by the lower court an extension until September 6, 1939, to fulfill his

office. *He has neither sought, nor has he been granted, any additional term.* Under such circumstances, it has been held by the Division of the Registries that (quotation from 96 Jurisprudencia Civil, pp. 599, 601, 602, follows) (R. 114 bot., 115).

"* * * Assuming that, upon the expiration of his term as executor, Mario Mercado Riera continued as agent of the other co-heirs, it is clear that his principals could terminate the agency at any time (Section 1624 of the Civil Code), and that under Section 1611 'every agent is bound to give an account of his transactions and to pay to the principal all that he may have received by virtue of the agency, even though what has been received is not owed to the principal' (R. 115 bot.).

"We say again that the powers conferred on the executor by the compromise contract *were so conferred one year before the expiration of his term* and that *the short and precise terms therein fixed do not imply at all the extension of such term* but, on the contrary, that the hereditary estate should be delivered to the heirs. They apportioned among themselves the hereditary estate (subdivision [f] of the compromise contract) and the commissioner of partition, bearing this in mind, and, moreover, the fact that the heirs had 'agreed regarding the form and the terms of the partition or distribution of the estate' (subdivision [1], compromise contract), likewise consented to said contract. *Neither the executor nor the commissioner complied, either within the terms fixed or subsequently, with the terms of the contract.* To hold that compelling the ex-executor to deliver the estate 'would amount to leave the performance of the compromise contract to the will of one of the parties,' as did the lower court is not justified by the facts of the case. On the contrary, it may well be maintained that upon the expiration of the executorship and of the terms fixed by the compromise contract, neither of the heirs shall be given possession of the whole hereditary estate, inasmuch as the execution of the will of the

testator devolves, under the law, upon all the heirs (R. 116). (Italics ours.)

"Neither within the proceeding regarding letters testamentary nor within the beneficiary acceptance proceeding did the estate of Mario Mercado Montalvo ever become a judicial administration, and, as the executorship had expired, it devolves upon the heirs to execute the will of the testator regarding any particular where the executor has failed to act" (R. 120 mid.).

Upon finding no error, the Court of Appeals affirmed the judgments of the Puerto Rico Supreme Court, whose conclusion was held to be *"patently correct"* (R. 930 mid., 931; 152 F. 2d 86, 96, col. 2).

Petitioner Porrata has further admitted that, according to "jurisprudence" construing local law, the partitioner was subject to the provisions of the local Civil Code granting an executor a period of one year from date of acceptance to discharge his duties and to close the executorship (R. 568 bot.); and in pursuance of such rule, Porrata himself sought and obtained an extension to comply with his duties as commissioner and to deliver "the definite partition of the estate to the parties entitled to it" until the 6th day of September, 1939 (R. 568 bot., 569, 571 mid.). But he failed to seek and obtain further extensions as the insular Supreme Court below correctly found (R. 100 top, 916, par. 2).

Appellants also, in their Statement on Appeal below, p. 32 (see footnote, *ante*, p. 64), concede that there appears to be "substantial civil law authority in the decisions of the Supreme Court of Spain and in the works of the commentators on the Spanish Civil Code, for holding, as the insular Supreme Court does, that the executor's term of office actually expired on September 2, 1939, two years after he first took office, despite the testator's express direction in the will that the one-year

term granted him by Section 826 of the Civil Code for executing his office shall be extended for all the time that may be necessary."

B. *No judicial administration of decedent's estate had ever been sought or decreed. None can arise in Puerto Rico by estoppel or implication.*

As to this additional aspect of local law and practice, the Island's Supreme Court, after fully considering the matter (R. 104-105 top, 116 mid.-120) held thus:

> "Although proceeding No. 1213, regarding beneficiary acceptance, was instituted by Adrián Mercado, *no provision was ever made within said proceeding by the lower court upon petition of any interested party for any judicial administration whatever of the estate* (Section 974 of the Civil Code, 1930 ed.), *nor was any appointment of judicial administrator ever sought or obtained in proceeding No. 782, regarding letters testamentary,* of this hereditary estate which has always been, ever since the death of the testator, in the possession of the coheir Mario Mercado Riera as testamentary executor (R. 104 bot.-105; italics ours).
>
> "Having reached the conclusion that the term of the executorship elapsed by statutory provision in September, 1939, it remains for us to decide whether, as maintained by the lower court, all the incidents in the present case, 'turned the whole controversy between these heirs into testamentary proceeding.' This is the same legal viewpoint adopted by the attorney for the ex-executor in his brief when referring to and commenting on the provisions of the law relating to special legal proceedings, *supra,* and when maintaining that the properties of the estate are under *custodia legis* on the ground that the proceeding for the issuance of letters testamentary turned the whole proceeding into an action *in rem,* as happens in the United States in 'probate proceedings' (R. 116).

"The question is not new and has already been determined by this Court."[39]

"It is true that in *Porrata v. District Court, supra,* we said that 'it may be that the time has come for the legislature to harmonize, by framing a complete statute covering the special field before us, the Spanish and American principles governing this whole and not unimportant phase of the law of decedents' estates.' However, the legislature has failed to do so, and, in the absence of any new statute, *it is our opinion that, in accordance with the facts* in the case at bar, it cannot be maintained that the substantive provisions of our Civil Code regarding the appointment, duties and terms of a testamentary executor may be considered as altered or modified as to their scope as substantive law by the procedural provisions of the law relating to special legal proceedings. NEITHER WITHIN THE PROCEEDING REGARDING LETTERS TESTAMENTARY NOR WITHIN THE BENEFICIARY ACCEPTANCE PROCEEDING DID THE ESTATE OF MARIO MERCADO EVER BECOME A JUDICIAL ADMINISTRATION, AND, AS THE EXECUTORSHIP HAD EXPIRED, IT DEVOLVES UPON THE HEIRS TO EXECUTE THE WILL OF THE TESTATOR REGARD-

[39] The Supreme Court then proceeds to cite: *Aponte & Sobrino v. Heirs of Perez*, 48 P. R. R. 437, 441-442 (*But that does not mean that because an executor has been appointed, the property of the estate is under judicial administration. The executor spoken of in our civil law is not in the same position generally prevailing in the American legal system.* Here, as there, the executor derives his authority from the will of the testator, from the testament which names him; but with us, when the testator does not especially determine his powers, these are limited by Section 824 of the Civil Code: R. 117); *Perez v. Succrs. of M. Perez & Co.*, 41 P. R. R. 844, 845 (Administrators and executors in the United States fully represent the deceased. In Puerto Rico the principle of universal succession in a modified form applies and the heirs represent the decedent from the moment of the death and are entitled to all the property); *Ex p. Suau*, 27 P. R. R. 890, 891 (If executor wishes to exercise authority not conferred by will, he should bring himself within scope of a judicial administrator by taking the steps required by law); *Heirs of Pellicia v. District Court*, 36 P. R. R. 588, 590 (executorship, unless otherwise provided by will, answers only a provisional and transitory situation pending acceptance of inheritance by heirs and their agreement as to division thereof); *Crehore v. Registrar*, 22 P. R. R. 30-33 (the executor is not the administrator of the estate, for unless the testator has conferred that character upon him he has no other powers than those specified in Sections 823 and 824 of the Civil Code—1930 ed.).

ING ANY PARTICULAR WHERE THE EXECUTOR HAS FAILED TO ACT (R. 119, bot.-120; emphasis supplied).

> "In our judgment, the lower court *exceeded its jurisdiction* when holding that the hereditary estate was under *custodia legis,* without any judicial administration having been decreed" • • • (R. 120).

Petitioner Porrata has conceded on this record that the executor *had "not requested a judicial administration* of the estate and that *none of the parties* interested in the executorship of the testator *have asked judicial intervention"* and that "the testamentary executor only has the powers enumerated in articles 824 and 825 of the Civil Code" (R. 214; *ante* p. 47).

The record also shows that, as petitioner Porrata has admitted, the testator "in the interest of economy, provided in his testament everything that is necessary for an *extrajudicial* liquidation of the same; a proceeding which always is beneficial to the heirs, legatees and creditors of an estate" (R. 799, par. 5).

In petitioners' brief, p. 62, reference is made to Section 25 of the Law of Special Legal Proceedings (Section 558, Code of Civil Procedure, ed. 1933). It is there provided that when all or one or more of the heirs are absent *or have no legal representative* in the jurisdiction of the last place of residence of the decedent, or where the property is located, the judicial administration of the property of the testator shall be necessary. Respondents fail to see the relevancy of this citation. First, because no point under the cited provision was raised in the local Supreme Court, and hence, it could not now be urged on appellate review (*Baetjer v. U. S. (P. R.),* 143 F. 2d 392, 397, and other cases in footnote 41, *ante,* p. 51). Secondly, because said Section 558 of the local Code of Civil Procedure (Sec. 25, Law of Special Legal Proceedings), refers to cases

where all or some of the heirs are absent *and have no agent or representative at decedent's domicile* or at the place where his property is located (Spanish text, which prevails, reads: "cuando todos o algunos de los herederos están ausentes *y no tengan representante legítimo* en la jurisdicción del último domicilio"). That, as its phraseology indicates, refers to a continued absence, but coheir Adrián Mercado, to whom petitioners allude, "returned to Puerto Rico, via United States, on the 22nd day of November, 1937" (R. 779, near bot.), without any judicial administration having been sought or decreed up to that time nor afterwards (R. 104, bot.-105). And thirdly, because even if the point had been raised below, it could have been shown that appellee Adrián Mercado, before and after decedent's death, had an attorney in fact (representante legítimo) representing him during his temporary (R. 499, line 9) absence from the Island.

Moreover, *a judicial administration* for a hereditary estate in Puerto Rico, under Sections 23 or 25 of the Law of Special Legal Proceedings (Sections 556 and 558, Code of Civil Procedure, ed. 1933), *can never arise by estoppel or implication, but it must be applied for through the proper petition, setting out the necessary and jurisdictional facts, and it must always be judicially decreed.*

That has been the settled rule in Puerto Rico for about forty years. See *Dexter v. District Judge* (1907), 13 P. R. R. 340 (under Section 25 of the Special Legal Proceeding Act, a sworn affidavit is required stating the necessary circumstances and petitioner must show his capacity to apply for the judicial administration); *Vicens, et al., v. Cruz (1914)*, 20 P. R. R. 179, 181 top (proceeding for judicial administration commences by filing petition to that effect; petition for appointment of a guardian ad litem does not initiate judicial administration); *Sabater v. Escudero* (1916), 23 P. R. R. 794, 798, par. 3 (pe-

tition for judicial administration must "set forth the particulars necessary to the end sought" and "personal right of petitioner should be established clearly"); *Ex parte Sotomayor,* 24 P. R. R. 173, 183 (under Section 25 of the Law of Special Legal Proceedings, even when there are minors, judicial administration is *decreed* only when they are not represented by their parents or guardian); *Ex parte Suau,* 27 P. R. R. 890, 891 (executor who wishes to exercise authority not conferred by will, should bring himself within the scope of a judicial administrator, *by taking the steps required by law*); *Ex parte Vega,* 28 P. R. R. 361, 363-364 (petitioner for a judicial administration "must show a clear right in himself and produce evidence in support of his allegations"; a proper petition should be filed duly showing the necessary facts, as required by the statute); *Succ'n de Jesús v. Corte,* 65 D. P. R. (Spanish), p. 3 (Section 556, P. R. Code of Civil Procedure provides also that the petition must state under oath "the interest and right of action" of applicant).

The foregoing plainly demonstrates that in Puerto Rico, under the special provisions relating to a judicial administration of a hereditary estate and local decisional authority thereunder, an *implied* judicial administration or one by estoppel, is a most fanciful conception.

The several proceedings that have occurred in connection with decedent's estate, have already been shown to be of an independent character, with different aims, each arising from different legal sources and having separate pleadings, hearings and judgments (see *ante,* 29-39).

As well pointed out by the Supreme Court of Puerto Rico (R. 104, bot.-105, 120; see also *7 Manresa, Comentarios al Código Civil,* 3ra. edición, pp. 480, 489), in none of those divers and distinct proceedings was there a judicial administration ever sought or decreed; not even within proceeding No. 1213 for beneficiary acceptance,

under Sections 974 and 980 of the Civil Code, nor in No. 782 regarding letters testamentary, as it should have been done in order to bring the estate within a costly and drastic judicial administration of *custodia legis.*

In its affirmatory judgment, the Court of Appeals concludes: "* * * the court below held that a petition under §556 of the Code of Civil Procedure, *supra,* was a *sine qua non* of judicial administration * * * In other words it held that under Puerto Rican law judicial administration cannot arise by implication or estoppel but only by petition in accordance with §556. Certainly we are not prepared to say that this conclusion is 'patently erroneous.' *On the other hand it would seem to be patently correct"* (R. 930 mid.; 152 F. 2d 96; italics supplied).

C. *The decision of the insular Supreme Court, affirmed by the Court of Appeals, even if reviewable here, should not be disturbed as it wholly deals with local law.*

A perusal of the Supreme Court's conclusions shows that they are reasonable, logical and in absolute harmony with the wording of insular statutes concerning executorships, partitionships and judicial administrators, and also in perfect accord with existing local jurisprudence.

Upon questions so peculiarly local, the federal courts and those of other jurisdictions owe great deference to what the Court concerned has done. It would be a strong thing for another tribunal to say that the insular Supreme Court did not know its own business under the local succession laws.

This highest National Court has stated many times the respect due to the understanding of insular courts upon matters of purely local concern; and also that federal appellate jurisdiction "is not given for the purpose of remodeling the Spanish-American law according to common law conceptions." *Díaz v. González y Lugo (P. R.),* 67 L. ed. 550, 552.

For "over sixty years" the Federal Supreme Court "has consistently recognized the deference due interpretations of local law" by teritorial courts. *Bonet v. Texas Co. (P. R.)*, 84 L. ed. 405.

Manifestly "the solution of the controversy must turn upon the meaning and effect of the above quoted sections of the Civil Code—the local law of Porto Rico" and considering and recognizing the high regard due to the understanding of local courts upon matters of purely local concern, the Federal Supreme Court accepted as correct the views of the insular Supreme Court. *Matos v. Hermanos (P. R.)*, 81 L. ed. 728, 730.

The Puerto Rico Supreme Court has stated that, in the absence of any new statute, it is its "opinion that, in accordance with the facts in the case at bar, it cannot be maintained that the substantive provisions of our Civil Code regarding the appointment, duties and terms of a testamentary executor may be considered as altered or modified as to their scope as substantive law by the procedural provisions of the law relating to special legal proceedings" (R. 120 top). And decisions by the Supreme Court of the Island regarding the construction of territorial statutes, in case of their possible conflict, *"are to be accorded the greatest weight" (P. R. v. Rubert Hermanos,* 86 L. ed. 1081, 1088, col. 2 mid.).

> "Orderly development of the government of Puerto Rico as an integral part of our governmental system is well served by a careful and consistent adherence to the legislative and judicial policy of deferring to the local procedure and tribunals of the Island." *Bonet v. Yabucoa Sugar Co.*, 83 L. ed. 949, 306 U. S. 510; *Bonet v. Texas Co. (P. R.) Inc.*, 84 L. ed. 405, 308 U. S. 431.

This Court has recently had occasion to again refer to the deference due to "the understandings of matters of

local law expressed in the pronouncements of the insular courts." *De Castro v. Board of Comm.*, 88 L. ed. 1385, 1392; *Hijos v. Commins*, 88 L. ed. 1396, 1399.

CONCLUSION.

For the reasons set forth in respondents' motion for dismissal (Appendix A), and for the further reasons above stated, it is respectfully submitted that the petition for certiorari should be dismissed or denied.

JOSÉ A. POVENTUD,
Attorney for Respondent,
Adrián Mercado Riera.

CELESTINO IRIARTE,
F. FERNÁNDEZ CUYAR,
H. GONZÁLEZ BLANES,
Attorneys for Respondent,
María-Luisa Mercado Riera.

APPENDIX "A."

Respondents' Motion for Dismissal of Petition for Certiorari.

A. Certiorari not applied for within three months after entry of judgment below.

The petition herein (p. 4 bot.) states that, since a rehearing was denied by the Court of Appeals on January 3, 1946, the three months' period for filing a petition for certiorari "expires April 3, 1946" (R. 933). However, the record exhibits that petitioners filed their motion for rehearing in the Court of Appeals on December 21, 1945, *i. e.*, prior to the usual Court's recess for Christmas and the New Year, and that upon January 3, 1946, the lower Court entered an order denying the petition for rehearing (R. 933).

It nowhere appears that the Court below entertained petitioners' *motion for a rehearing. Rule 32* of the Court of Appeals for the First Circuit, insofar as pertinent, provides that a petition for rehearing "will not be granted, unless a judge who concurred in the judgment desires it, and a majority of the Court so determines." Hence, the petition for rehearing below did not toll the running of the period limited by *28 U. S. C. A.*, §350, for seeking a review of the judgment herein, as such motion did not at all operate to suspend the finality of the Court of Appeals' affirmatory judgment. It follows that the three months' period within which to apply for a writ of certiorari, would seem to have expired on or about February 24, 1946. As the record shows, petitioners' application was filed in this Court beyond the statutory period.

Federal appellate jurisdiction must affirmatively appear. *Southwestern Bell Tel. Co. v. Oklahoma,* 82 L. ed. 752, 755, col. 1 mid. The burden of proving jurisdiction rests

on the party who asserts it, not on those who challenge it. *McNutt v. General Motors Accept. Corp.*, 80 L. ed. 1135; *Patterson v. Stanolind Oil and Gas Co.*, 83 L. ed. 231, 232; *Clark v. Paul Gray*, 83 L. ed. 1001.

This Hon. Court has stated that a defeated party who applies for a rehearing and does not appeal within the time limited for so doing, takes the risk that he may lose his right of review, as the application for rehearing, if the Court refuses to entertain it, does not extend the time for appeal. *Wayne United Gas Co. v. Owens Illinois etc. Co.*, 81 L. ed. 557, 561.

B. Reasons in Court's opinions are not reviewable.

As heretofore shown (Point II, *ante* pp. 46-54), petitioner Porrata has no litigable or other interest in the certiorari proceedings which were appealed from the insular Supreme Court to the Court of Appeals. The petition in the District Court of Ponce for the surrender of the estate to the heirs and the rendition of supplemental accounts, was directed exclusively against the ex-executor, now petitioner Mario Mercado Riera (R. 348-358, 121).

That was a special proceeding arising out of Sections 832 and 833 of the Puerto Rico Civil Code (ed. 1930), to the effect that, upon expiration of an executorship's term, the incumbency terminates *ipso jure* even though not then completed; and that, if the executor refuses to turn over the estate or render accounts, he may be judicially compelled to do so, and the Supreme Court of Puerto Rico so determined (R. 114).

Petitioner Porrata, as ex-partitioner of the Mercado estate, did not possess the hereditary estate and, hence, he did not have either to return it or to render any accounts to the heirs; *a fortiori*, when Porrata, while partitioner, accepted a *compromise agreement* whereby the

properties of the estate were "adjudicated in equal parts" among the "testator's four heirs," further acquiescing in said contract among the coheirs and "agreeing to all of its covenants, terms and conditions insofar as they affect him as auditor-partitioner of the aforesaid estate, undertaking to abide by its provisions • • • " (R. 542 mid., 544 mid., 545).

The Supreme Court of Puerto Rico stated that Porrata, bearing in mind the fact that the heirs had "agreed regarding the form and terms of the partition or distribution of the estate," likewise consented to said contract (R. 116).

In this connection the Court of Appeals also refers to the adjudication of the estate by and between the heirs in equal parts, and to Porrata's consent thereto, as well as to *Porrata's lack of "any personal financial interest in any phase of the litigation before us on these appeals. His fee was agreed upon in the contract of compromise,* and appellees say in their brief *and Porrata admitted in argument before us, that this fee has been paid in full"* (R. 918, 919, 931 mid.; *Mercado Riera v. Mercado Riera,* 152 F. 2d 90, 96, col. 2 bot.). The Court of Appeals held that Porrata "is not officially affected by the judgments rendered by the court below" [insular Supreme Court]. "He never had any duty to administer the estate or to account for it, nor did he ever have possession of any of the assets of the estate or any duty to turn it over to the heirs • • •" (R. 931 mid.; *Mercado Riera v. Mercado Riera,* 152 F. 2d 97, col. 1 top).

It is, therefore, easy to conceive that, although Porrata apparently appealed as alleged "commissioner" from a judgment of the Supreme Court of Puerto Rico in certiorari No. 1517 (R. 121), *he complains only of certain excerpts in the opinion* rendered by the insular Supreme Court.

But, apart from the obvious correctness in all respects of the insular Supreme Court's decision on matters of local law, peculiarly within its knowledge, Courts' opinions do not constitute judgments from which appeal must be taken, as rights of parties are adjudged solely by decretal portion of a decree, and it is only such portion of a final judgment from which appeal lies. *McGhee v. Leitner*, 41 F. Supp. 647, 675; *Certain, etc., Corp. v. Wallinger*, 89 F. 2d 427, 429, col. 2; *Wright v. Gibson*, 128 F. 2d 865.

That is why respecting Porrata, the Court of Appeals said that "the final decisions of the Court below (local Supreme Court) are embodied in its judgments, not in its opinions, and its judgments, as we have shown, do not affect Porrata" (R. 932 mid.; *Mercado Riera v. Mercado Riera*, 152 F. 2d 97, col. 2 top).

And in *Herb v. Pitcairn* (1945), 89 L. ed. (Adv. Ops., 481, 486), this Court holds that its "power is to correct wrong judgments, not to revise opinions."

C. The judgments of the insular Supreme Court which were affirmed by the Court of Appeals, rested on adequate non-federal grounds.

The record shows that the Supreme Court of Puerto Rico *did not pass* upon any federal question at all and that its judgments were solely predicated upon sufficient non-federal grounds, that is, simply on sound local law of long standing (*ante*, 18-20, 53-56). See also opinion of insular Supreme Court (R. 97-121).

It was in the Court of Appeals that appellants, now petitioners, urged as alleged federal questions, that §40 of the Organic Act crystallized the form of procedure in the insular courts, etc. The argument, however, was dismissed as "unsound" (R. 923 mid., 924; 152 F. 2d 93, col. 1 mid.).

When, as above stated, the judgments of the local Supreme Court now sought to be reviewed, are predicated upon sufficient non-federal grounds, any contention regarding the existence of a federal question becomes untenable and dismissible. *Bell Tel. Co. of Pa. v. Van Dyke,* 80 L. ed. 379, 380; *Woolsey v. Best,* 81 L. ed. 3, 4; *Southwestern Bell Tel. Co. v. Oklahoma,* 82 L. ed. 752, 755; *McGoldrick v. Gulf Oil Corp.,* 84 L. ed. 536 (cert. dism.); *Holey v. Lawrence* 87 L. ed. 434; *Flourney v. Wiener,* 88 L. ed. 709; *Herb v. Pitcairn,* 89 L. ed. (Adv. Ops., 481, 482); *Copperweild Steel Co. v. Industrial Com.,* 89 L. ed. (Adv. Ops., 928, 930).

D. Lack of adequate or valid reasons for allowance of certiorari herein.

Review on a writ of certiorari is not a matter of right, but of sound judicial discretion and will be granted only where there are special and important reasons therefor. *Rule 38(5)* of this Court.

The questions and reasons relied on by petitioners here, are really frivolous as the judgments of the insular Supreme Court, affirmed by the Circuit Court of Appeals, (1) in no way conflict with any applicable decisions of this Court or with applicable local decisions, (2) nor do they depart from the accepted or usual course of judicial proceedings, (3) or in any way concern the public interest.

The questions presented and the alleged reasons urged in the petition (pp. 5-9), may be briefly summarized thus: 1, That the Supreme Court of Puerto Rico was without jurisdiction on certiorari to review certain orders of the Ponce District Court; 2, That the insular Supreme Court, on certiorari, could vacate any orders reviewed, but could not grant appropriate relief; 3, That there was alleged absence of due process as to petitioner Porrata; and 4,

That, as a matter of purely local law, the insular Supreme Court erred patently and inescapably in holding that there was no judicial administration of the estate involved, and that the executorship and partitionship expired in 1939.

In order to avoid superfluous repetition, respondents respectfully refer this Hon. Court's attention to Points I-VI of this brief, where it is clearly shown that the Supreme Court of Puerto Rico had complete jurisdiction on certiorari to the District Court of Ponce in cases Nos. 1516, 1517 and 1518 (*ante,* 40-46); that Porrata, as intervenor in certiorari No. 1517, lacked the requisite litigable interest to give him standing in court, and that, as to him, there was no absence of due process, as he was amply heard, even through counsel in the local Supreme Court (*supra,* 47-54, 57); that the insular Supreme Court had jurisdiction on certiorari to review proceedings Nos. 1516, 1517 and 1518 and to affirm or vacate and grant appropriate relief (*supra,* 59-61); that, as a matter of local law, the Puerto Rico Supreme Court correctly held that the executorship and partitionship legally expired in 1939, and that no judicial administration of decedent's estate had ever been sought or decreed (*supra,* 76-89).

On these esoteric questions of local law and practice of Spanish origin, the Court of Appeals said that the insular Supreme Court *"would seem to be patently correct"* (R. 930 near bot.; 152 F. 2d 86, 96, col. 2 top).

The Supreme Court of Puerto Rico decided nothing in conflict with applicable local practice and decisions or with the accepted and usual course of judicial proceedings.

The Court of Appeals properly held that *"we are far from convinced that the decision of the court below* [the Supreme Court of Puerto Rico] *in the instant case is at variance with its earlier decisions* * * *" (R. 924 top), and that, to refute such contention, now again urged by

petitioners here, "we need only to quote relevant decisions of the court below" [local Supreme Court] (R. 926). The Court of Appeals then proceeds to refer to numerous Puerto Rican decisions, to conclude that "it is abundantly clear that the Supreme Court of Puerto Rico under local law of long standing has discretionary power to issue writs of certiorari in order to expedite review even when review by appeal is available" (R. 928; 152 F. 2d 93, 94, 95).

Petitioner Porrata, without any foundation in fact or in law, insinuates that he was not accorded notice, hearing or due process below, and refers to *Coe v. Armour Fertilizer Works,* 237 U. S. 413, 59 L. ed. 1027, 1032, and *Saunders v. Shaw,* 243 U. S. 317, 61 L. ed. 1163, as applicable decisions of this Court respecting due process.

But *Rule 38(5)(b)* suggests as a possible reason for review on certiorari, that a federal question was decided "in a way probably in conflict with *applicable* decisions of this Court." As already pointed out, *no federal question* has been *decided* by either the Supreme Court or the Court of Appeals *in conflict with any decision of this Court.* Respecting the point raised in the Court of Appeals by appellants there, now petitioners, regarding the effect by them ascribed to §40 of the Organic Act as to crystallizing the form of procedure in the insular courts, the Court of Appeals held that the Organic Act, §40, "intended merely to provide a basic procedure which, within constitutional and statutory limits, the insular courts, like courts administering the Common Law, could develop as they saw fit"; and, on further elaboration, the point was dismissed as "unsound" (R. 924; 152 F. 2d 93, col. 1 mid.).

As to petitioner Porrata, the Court of Appeals stated that he did not appear to have any personal financial in-

terest in any phase of the litigation; that his fee as partitioner was admitted by him to have been paid in full; and that even the judgments of the insular Supreme Court did not affect him (R. 931-932; 152 F. 2d 96, col. 2 bot.-97).

As the petition in the Ponce District Court against ex-executor Mario Mercado Riera, petitioner here, upon conclusion of his executorship, simply demanded of him the delivery of the estate to the heirs and the rendition of final supplemental accounts, it obviously did not concern Porrata. It was not directed against him, nothing was demanded of him and he never had possession of any of the assets of the estate. Hence, Porrata had no duty to return assets not in his custody nor to render any accounts thereon (R. 931 mid.; 152 F. 2d 96, col. 2 bot., 97).

Under the law of Puerto Rico, when a proceeding is not brought or directed against a person, he is not a necessary party *Flores v. Llompart,* 50 P. R. R. 641, 645 mid.; *Pellicia v. Court,* 36 P. R. R. 588; *Rodríguez v. Arocho,* 62 D. P. R. 700 (Spanish edition).

Obviously for that reason, among others, Porrata did not chose to intervene in the proceeding for the surrender of the estate in the Ponce District Court *under Section 72 of the Puerto Rico Code of Civil Procedure, ed. 1933,* notwithstanding he well knew of its pendency (*ante,* 48). Concerning Porrata's separate and new proceeding for the purported approval of his so-called report or draft of partition, subsequently filed by him in the Ponce District Court, see *supra,* pp. 35-39, 47-50. But Porrata, by his intervention in the insular Supreme Court, certiorari No. 1517, accepted and invoked its jurisdiction and powers on the merits (R. 83-96), to set aside the writ of review issued *and to enter any other proper pronouncements* (R. 69), thus inviting action and rulings by the local Supreme Court, which had jurisdiction over the parties and the

subject-matter. *Porrata also lodged an answer* to certiorari petition No. 1517 in the insular Supreme Court *joining issue on the merits and urging practically the same objections which had been raised by the ex-executor Mario Mercado Riera, petitioner here* (R. 83-96, 65). Porrata further argued the case at the hearing before the Supreme Court through counsel (R. 96 bot.). The Court of Appeals also states that Porrata "filed an answer to the petitions for certiorari and a brief in support thereof, and his counsel was heard orally" (R. 921 mid.; 152 F. 2d 91, col. 2 bot.).

Hence, it is quite plain that Porrata was amply heard by the insular Supreme Court in all respects.

That is sufficient reason, in addition to what has already been stated, why the cases of *Coe v. Armour Fertilizer Works* and *Saunders v. Shaw, supra,* cited in petitioners' brief, pages 57, 59, are not apposite here and can in no way conflict with any alleged federal or other question decided by either the local Supreme Court or the Court of Appeals. In neither the *Coe* nor the *Saunder* cases concurred the facts and circumstances surrounding certiorari proceeding No. 1517 of the insular Supreme Court. In No. 1517 Porrata, through his intervention in the Puerto Rico Supreme Court, was accorded full hearing and argument, *though he never had been a necessary party in the Ponce Court of first instance, because the proceeding was not directed, nor was judgment demanded, against him.*

As to the reason given in the certiorari petition (Br. 5 bot., 8, 62) that, as a matter of purely local law, the insular Supreme Court erred in holding that no judicial administration of the estate was granted and that the executorship and partitionship expired by law in 1939, it would seem sufficient to refer to respondents' brief (Point VI, pp. 75-87). It is there shown that the insular Supreme Court justly, intelligently and logically, held

that, in harmony with Puerto Rican law and practice, the executorship and partitionship in the Mercado estate legally expired in 1939; that no judicial administration of decedent's estate had even been sought or decreed, and that no judicial administration of decedent's estate in Puerto Rico may arise by estoppel or implication.

Uninterrupted and numerous rulings of this Court, point to the doctrine of deference to the understandings of matters of local law as expressed in the pronouncements of insular tribunals. Their decisions, even when reviewable, should not be disturbed except upon a clear showing of patent or inescapable error. *Díaz v. González*, 67 L. ed. 550, 552; *Bonet v. Yabucoa Sugar Co.*, 83 L. ed. 949; *Bonet v. Texas Co.*, 84 L. ed. 405; *Puerto Rico v. Rubert Hnos.*, 86 L. ed. 1081, 1088, col. 2 mid.; *De Castro v. Board of Comm.*, 88 L. ed. 1384; *Hijos v. Commins*, 88 L. ed. 1396. The Court of Appeals, after fully and carefully considering the whole situation, determined that the insular supreme court *"would seem to be patently correct"* (R. 930 mid.; 152 F. 2d 96, col. 2 top, 97).

The foregoing manifestly exhibits that the certiorari petition urges no reviewable question, and much less any point which it is in the *public interest* to have decided by this Court of last resort. The petition states (p. 6 mid.) that: *"The Government and People of Puerto Rico,* as well as these petitioners, have at least a strong *moral right"* to be told "by the highest judicial tribunal of the nation," whether the insular Supreme Court is permitted by the Federal Organic Act to review by certiorari insular District Court's orders "of the nature of those vacated in these cases."

Of course, a *moral right* is no legal ground for invoking the jurisdiction of this Honorable Court. Legal, not merely moral rights are a proper subject for judicial

enforcement or review. *1 C. J.*, Section 48, p. 952; *1 C. J. S.*, Section 10, p. 993.

The record demonstrates that the three certiorari proceedings in the Puerto Rico Supreme Court, involved only *questions of a private character between private citizens*, like, among others, "whether the executorship of Mario Mercado is in force" under local law (R. 97 bot., 110). The Court of Appeals found that this litigation emerges from a "controversy between three of the four children and heirs of one Mario Mercado, a widower, who died, testate, domiciled in Puerto Rico * * *" The controversy and decisions thereon, solely concern the parties to the several proceedings in the local courts. The Government and the People of Puerto Rico have absolutely no interest herein.

In *Magnum Import Co. v. Coty*, 262 U. S. 159, 67 L. ed. 922, 924, col. 1 bot., this Court held that jurisdiction to bring up cases by writs of certiorari from the Circuit Courts of Appeal, was conferred upon the Supreme Court of the United States for two purposes: first, to secure uniformity of decisions between those courts in the nine circuits; and, second, "to bring up questions of importance which it is in the *public interest* to have decided by the court of last resort. *The jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing.*"

E. Petitioners' want of litigable interest. Moot character of questions presented.

1. *In case No. 1516 of the local Supreme Court* (R. 1-11), the decision simply vacates service (R. 97 bot., 98, 120 bot.) of a claim for fees (R. 366) which was attempted to be served by attorneys Zapater and Ochoteco, as claimants, on attorneys who acted for respondents (R. 369,

374 bot.) in other and separate proceedings. The ex-executor, now petitioner Mario Mercado Riera, who attempted to appeal (R. 24) therefrom to the Court of Appeals was really *a defendant* (R. 369 near bot.) in said proceeding No. 1516.

a. Wherefore, it becomes evident that the only parties aggrieved by that decision, if at all, were claimants, the said attorneys Zapater and Ochoteco (R. 366 bot.). *But they did not appeal.* As already stated, in No. 1516, review was sought in the Court of Appeals only by the ex-executor Mario Mercado Riera, who was not aggrieved and, *as codefendant, was obviously favored* by the decision of the local Supreme Court in that case. So, he clearly has not any reviewable interest.

b. Hence, any proposed review in No. 1516, merits immediate dismissal (*In re Schwartz,* 89 F. 2d 172, 173; *In re Kane,* 48 F. 2d 97, 98; *Olsen v. Jacklowitz,* 74 F. 2d 718; *Harding v. Nat. Bank,* 31 F. 2d 914).

2. *In No. 1517,* copetitioner, the ex-commissioner for partition Pedro M. Porrata, attempted to appeal to the Court of Appeals, in his supposed representative capacity (R. 126), *not even individually,* from a judgment of the insular Supreme Court of July 14, 1943 (R. 121)—

> "ordering the ex-executor Mario Mercado Riera to proceed to deliver the estate left by Mario Mercado Montalvo to his heirs María-Luisa, Adrián, Margarita and Mario Mercado Riera, in compliance with the compromise contract executed on September 9, 1938, and also to render them supplementary accounts as from October 27, 1941, when the former accounts were rendered, until the time of such delivery, for all of which he is allowed a term of sixty days."

a. It is readily noted that the order objected to by the ex-commissioner, *does not concern him individually nor*

in any other capacity at all; it simply refers to the ex-executor Mario Mercado Riera, now petitioner, who withheld the estate from the heirs and was bound and required to render them supplemental accounts.

b. This also inescapably follows from a sworn petition filed in the insular Supreme Court by the ex-commissioner, Pedro M. Porrata, in August, 1943, *i. e.*, after the judgment was rendered by the Puerto Rico Supreme Court on July 14, 1943. In that petition for a supersedeas (pp. 8-9, Spanish text), ex-commissioner Porrata expressly stated and acknowledged (translated into English):

> "XI. That the commissioner for partition *has none of the assets of the estate in his possession,* and has no objection to their being administered by their actual executor, Mr. Mario Mercado Riera, by the district court of Ponce through an administrator or by the four heirs, as decreed by the judgment of this Hon. Court; by reason whereof, the amount of the bond to be fixed, in the circumstances, should be purely nominal" (see R. 141).
>
> "XII. * * * 2. That movant has none of the hereditary assets in his possession. 3. *That movant does not object to the administration of the assets by one or by all the four heirs,* by the district court of Ponce or in any other form agreeable to the owners" (see R. 142 mid.).
>
> (Certified copy of the foregoing excerpts, issued by the Secretary-Reporter of the Supreme Court of Puerto Rico, is made a part hereof, as Sub-Appendix A-II.)

c. It further appears that ex-commissioner Porrata has no personal or financial interest in case No. 1517, as even his alleged fees ($20,000), not here involved, *happen to have been paid to him,* though illegally, by the

ex-executor's check, charged to the heirs, in November, 1941 (*infra*, p. 109).[60]

d. To entitle one to a review by an appellate federal court, petitioner or appellant must have a personal, direct, immediate, pecuniary, substantial and subsisting interest in the matter in question, which has been adversely affected by the ruling complained of. When such interest does not exist, the appeal should be dismissed. *In re Michigan-Ohio Bldg., Corp.*, 117 F. 2d 191, 193; *Longest v. Langfort*, 72 L. ed. 473; *Hamilton Trust Co. v. Mines Co.*, 223 Fed. Rep. 494, cert. den. 60 L. ed. 482.

e. Furthermore, ex-commissioner Porrata took his pretended appeal to the Court of Appeals in No. 1517 in his supposed *representative capacity* (R. 126) *only, not individually*. The personal character of his claimed interest in the alleged fees, precludes his efforts at further review in a representative capacity (3 C. J. 646), even though such matter had been involved in the local Supreme Court, which is not the case, and even assuming that the fees had not already been paid to the ex-commissioner by the ex-executor (*infra*, 109; R. 931).

3. *In cases Nos. 1517 and 1518, the allowance of the review sought by the ex-executor Mario Mercado Riera, petitioner herein, can serve no beneficial purpose, as the questions presented by him have also become moot or abstract and any possible appellate remedy would be ineffectual in the premises.*

a. After rendition of the judgments by the local Supreme Court on July 14, 1943 (R. 24, 121, 181), which the ex-executor, now petitioner, seeks to have reviewed, he filed in the insular Supreme Court *a sworn motion* for a

[60] As lack of interest, like absence of jurisdictional amount, affects reviewing Court's jurisdiction, it may be shown by extrinsic evidence (*Mills v. Green*, 40 L. ed. 293; *Dakota v. Glidden*, 28 L. ed. 981; *Kimball v. Kimball*, 43 L. ed. 932, 934; *Clark v. Gray*, 88 L. ed. 1001).

supersedeas bond (R. 155-161), wherein he admits having sent a letter to respondents, and copy to the other heir Margarita Mercado Riera, reading (translated into English), thus:

"My dear sirs:

"This is to inform you that insofar as concerns the estate left at the decease of our father, Mario Mercado Montalvo, *I consider myself disconnected therefrom in every sense, except as co-owner thereof,* in accordance with what was agreed in the compromise agreement of September 9, 1938, *and all business concerning same must be transacted through the heirs and not through its executorship.* Therefore, and as the undersigned, in connection with said estate, has only exercised the powers conferred on him by the compromise agreement as executor and co-owner thereof, I beg to communicate that I shall notify all persons who hold properties of the estate as lessees or in any other manner, that from this day, instead of transacting business with the succession of Don Mario Mercado Montalvo through the executorship, they must do so with all the heirs as co-owners of the estate. Respecting yourselves, on or before September 10, 1943, *I shall send you the final supplementary account, advising you that you must begin to provide in accordance with the circumstances, for I consider myself completely disconnected from the collection of debts and payment of obligations of the hereditary estate* left at the death of our father, *and without any jurisdiction over the estate,* except such as refers to the undersigned as co-owner thereof, and such as may result from the fact that this inheritance was accepted on benefit of inventory. I take this step without prejudice to the appeal taken by the executorship from the judgment of the Supreme Court of Puerto Rico dated July 14, 1943, in cases Numbers 1516, 1517 and 1518, certiorari, brought by Mrs. María Luisa and Mr. Adrián Mercado Riera, so as not to have any

bearing (acción) on the estate pending the appeal, and, of course, under compulsion of the aforesaid judgment.—Very truly, Executorship of Mario Mercado Montalvo, by Mario Mercado, Jr., Executor." (*Italics supplied.*)

b. That in the latter part of August, 1943, the ex-executor, now petitioner Mario Mercado Riera, filed another motion in the insular Supreme Court (case No. 1517), advising having mailed upon August 10, 1943, a letter to debtors, lessees, legatees and other creditors of the estate, with copies thereof to appellees—

> "advising of the necessity to transact the affairs connected with said estate through the four heirs of the succession of Don Mario Mercado Montalvo, from August 7, 1943, and not through the executorship, as had been done heretofore."

The matters or excerpts set forth in preceding paragraphs "a" and "b," are evidenced by certificate issued by the Secretary-Reporter of the Supreme Court of Puerto Rico, attached hereto as *Sub-Appendix A-II. See footnote 60.*

c. Dated September 9, 1943, the ex-executor, petitioner Mario Mercado Riera, mailed a letter addressed to respondents, María-Luisa and Adrián Mercado Riera, and to the other coheir, Margarita Mercado Riera, together with the *final supplemental accounts* which were ordered to be rendered by the judgment of the Puerto Rico Supreme Court (R. 121). In said letter of September 9, 1943, the ex-executor stated:

> "I again definitely place in your possession the properties of the estate, *considering myself disconnected therefrom* respecting the functions which I had been exercising concerning them in accordance with the said compromise agreement and the law, reserving, of course, my rights as coheir of said estate, and without prejudice to the appeal

> taken by me before the Circuit Court at Boston, from the judgment entered by the Supreme Court of Puerto Rico dated July 14, 1943, in certiorari cases numbers 1516, 1517 and 1518." (*Italics ours.*)

The final supplemental account rendered by the petitioner Mercado, has been extrajudicially objected to in writing by the respondents and by their sister Margarita Mercado Riera.

d. Upon October 9, 1943, petitioner Mario Mercado Riera, mailed another letter to respondents, who received it, and to their sister Margarita Mercado Riera, advising them, with reservation of his rights *as coheir* of the estate, to have—

> "placed in possession of Don Francisco Parra Capó, in his office at Calle Amor, No. 2, Ponce, Puerto Rico, the documents, deeds, certificates of stock, etc., etc., belonging to the succession of Don Mario Mercado Montalvo, as per list attached hereto, so that said documents may be accessible to all the four heirs of the succession of Don Mario Mercado Montalvo."

e. By petitioner Mercado's conduct in disclaiming interest in the estate except as coheir, and by his notices to lessees, legatees and other creditors, requiring them to transact all further business with the four heirs, and not through the ex-executor, respondents and their sister Margarita Mercado Riera, since the judgment rendered by the insular Supreme Court in No. 1517 (July 14, 1943), were induced and have discharged or paid off their three-fourth part of all legacies and interests which were due by the estate of Mario Mercado Montalvo, and also, on March 1, 1944, their three-fourth part of income-tax deficiencies assessed against the estate by the insular Treasurer, etc.

(1) To accomplish that, respondents and their sister Margarita sold their three-fourth interest in several urban properties of the estate to the other co-heir, as vendee, now ex-executor and petitioner Mario Mercado Riera, by deed No. 44, dated November 18, 1943, executed before Notary Public J. C. Santiago Matos, whereby the said petitioner paid vendors the sum of $70,350 which they applied, with other funds, to the extinction of their share in the aforesaid liabilities.

(2) Subsequently, respondents, Adrián, María-Luisa Mercado Riera and their sister Margarita, as well as petitioner Mario Mercado Riera, the ex-executor, sold for $10,000 ($2,500 for each of the four heirs), the shares of stock belonging to the estate of Mario Mercado Montalvo in Bazar Atocha, Inc., of Ponce, Puerto Rico, etc.

(As to statements in foregoing paragraphs "c," "d" and "e," see Sub-Appendix A-1.)

f. In view of the ex-executor's conduct subsequent to the judgment of the local Supreme Court affirmed by the Court of Appeals, now sought to be reviewed, as such conduct appears from paragraphs "a" to "e" above (abandonment of the estate by the ex-executor; requesting legatees and creditors to transact all business with the heirs instead of through the ex-executorship and asking the heirs to do the same; buying of his co-heirs interest in several of the properties of the estate and joining them in selling to strangers a part thereof), it must be concluded that any further controversy between said petitioner and his co-heirs as to his supposed right to withhold the estate, has become moot.

(1) Petitioner Mercado's spontaneous procedure, following entry of the local Supreme Court's judgment against him, is plainly inconsistent with his petition for certiorari herein, notwithstanding his so-called reservations, *and renders ineffectual any possible appellate rem-*

edy. Talbot v. Mason, 125 Fed. Rep. 101, estoppel to continue appeal; *Chiesa v. Life Ins. Co.,* 169 Fed. Rep. 509, question academic and cert. den. 54 L. ed. 344; *Lisman v. Trust Co.,* 211 Fed. Rep. 413, 417, moot issues shown by extrinsic evidence; *Goldstein v. Behrends,* 123 Fed. Rep. 399, want of controversy; *Radio Corp. v. Chicago Bears F. Club,* 97 F. 2d 223, 224, appellate remedy ineffectual; *Hubbard v. Art Museum,* 196 Fed. Rep. 871, 874; *Vidal v. Securities Co.,* 276 Fed. Rep. 857, 874, no effectual appellate relief.

WHEREFORE, petitioners' application for certiorari herein should be dismissed.

Respectfully submitted,

JOSÉ A. POVENTUD,
Attorney for respondent,
ADRIÁN MERCADO RIERA.

CELESTINO IRIARTE,
F. FERNÁNDEZ CUYAR,
H. GONZÁLEZ BLANES,
Attorneys for respondent,
MARÍA-LUISA MERCADO RIERA.

SUB-APPENDIX NO. A-1.

Affidavit by Salvador S. Mandry, Esq.[61]

I, SALVADOR S. MANDRY, being duly sworn, do depose and say:

That I am of full legal age, married to Margarita Mercado Riera, one of the heirs of the estate left by Mario Mercado Montalvo; that I reside in Ponce, Puerto Rico, and am now one of the attorneys in fact for Adrián, María-Luisa and Margarita Mercado Riera; and that I have personal knowledge of the following facts, to wit:

1. That Mario Mercado Riera, ex-executor of the estate of Mario Mercado Montalvo, on September 9, 1943, served on Adriàn, María-Luisa and Margarita Mercado Riera, his co-heirs, "final supplemental accounts from March 5, 1940 to August 31, 1943," on page 2 whereof under the heading *"DISBURSEMENTS"* (EGRESOS), there appears an item, charged to the said heirs, reading (translated into English), thus:

> "Pedro M. Porrata, Commissioner for Partition (Contador-Partidor) $20,000.00."

2. That the original entry of such disbursement appears under date of November 17, 1941, in quarterly supplemental accounts (October 24, 1941 to January 31, 1942), extrajudicially rendered by the said ex-executor to Adrián María-Luisa and Margarita Mercado Riera, and the said entry (translated into English), is as follows:

---

[61] This affidavit and a certificate issued by the Clerk of the insular Supreme Court (SUB-APPENDIX A-II), were filed in the Appellate Court below. Both documents had been additionally certified to supplement the record here, by the Clerk of the Court of Appeals.

"Paid to attorney Pedro M. Porrata, by check Number 253, fees agreed in compromise contract of September 9, 1938, issued in favor of the beneficiary, as Commissioner for Partition of the estate of Mario Mercado Montalvo $20,000.00."

3. That, dated September 9, 1943, Mario Mercado Riera mailed a letter addressed to María-Luisa, Adrián and Margarita Mercado Riera, together with final supplemental accounts, in which letter Mario Mercado Riera stated (translated into English):

"I again definitely place in your possession the properties of the estate, considering myself disconnected therefrom respecting the functions which I had been exercising concerning them in accordance with the said compromise agreement and the law, reserving, of course, my rights as co-heir of said estate, and without prejudice to the appeal taken by me before the Circuit Court at Boston, from the judgment entered by the Supreme Court of Puerto Rico, dated July 14, 1943, in certiorari cases numbers 1516, 1517 and 1518."

4. That the said final supplemental account rendered by Mario Mercado Riera has been extrajudicially objected to in writing by María-Luisa, Adrián and Margarita Mercado Riera.

5. That upon October 9, 1943, Mario Mercado Riera mailed another letter to Adrián, María-Luisa and Margarita Mercado Riera, notifying them, after reserving his rights as co-heir of the estate, and without prejudice to his appeal taken to the Court of Appeals for the First Circuit, to have—

"placed in possession of Don Francisco Parra Capó, in his office at Calle Amor, No. 2, Ponce, Puerto Rico, the documents, deeds, certificates of stock, etc., etc., belonging to the succession of Don Mario Mercado Montalvo, as per list attached here-

to, so that said documents may be accessible to all the four heirs of the succession of Don Mario Mercado Montalvo."

6. That by the said Mario Mercado Riera's conduct in disclaiming interest in the estate except as co-heir, and by his notifications to lessees, legatees and other creditors, requesting them to transact all further business with the four heirs and not through the executorship, María-Luisa, Adrián and Margarita Mercado Riera, since the judgment rendered by the Supreme Court of Puerto Rico in case No. 1517 (July 14, 1943), were invited to and they did pay off, through affiant, their three-fourth part of all legacies and interests which were due by the estate of Mario Mercado Montalvo, and also, on March 1, 1944, they further paid off their 3/4 part of income tax deficiencies assessed against the said estate by the insular Treasurer, etc.

7. That in order to accomplish such payments, Adrián, María-Luisa and Margarita Mercado Riera sold their three-fourth interest in several urban properties in the said estate to the other co-heir, as vendee, Mario Mercado Riera, by deed No. 44, dated November 18, 1943, executed at Ponce before Notary Public, J. C. Santiago Matos, whereby the said Mario Mercado Riera paid vendors the sum of $70,350, which they applied with other funds to the extinction of their three-fourth share in the mentioned liabilities; and that, subsequently, Adrián, María-Luisa and Margarita Mercado Riera, as also Mario Mercado Riera, have sold for ten thousand dollars ($2,500 for each of the four heirs), the shares of stock belonging to the estate of Mario Mercado Montalvo in Bazar Atocha, Inc., of Ponce, Puerto Rico, etc.

SALVADOR S. MANDRY,
Affiant.

Island of Puerto Rico,
District of Ponce, ss:

Sworn to and subscribed before me by Mr. Salvador S. Mandry, of Ponce, Puerto Rico, U. S. A., of full legal age, married to Margarita Mercado Riera, agriculturist, to me personally known, at Ponce, Puerto Rico, this 7th day of March, A. D., 1944.

GUSTAVO RODRIGUEZ,
Notary Public.

AFFIDAVIT No. 21.

I, Joaquin López Cruz, Secretary-Reporter of the Supreme Court of Puerto Rico, do hereby certify:

That the foregoing is the genuine signature of Mr. Gustavo Rodríguez, of Ponce, P. R., a Notary Public in and for the Island of Puerto Rico, duly authorized and commissioned as such.

San Juan, Puerto Rico, March 8, 1944.

JOAQUIN LOPEZ,
Secretary-Reporter,
Supreme Court of Puerto Rico.

SUB-APPENDIX NO. A-II.

IN THE SUPREME COURT OF PUERTO RICO.

María-Luisa Mercado Riera de Belaval and Adrián Mercado Riera, Petitioners, v. District Court of Ponce, Hon. Ramón A. Gadea Picó, Judge, Respondent.	No. 1517 Certiorari.

Certificate by the Secretary-Reporter of the Insular Supreme Court as to Part of the Record in the Above Matter.[62]

I, Joaquin López, Secretary-Reporter of the Supreme Court of Puerto Rico, do hereby certify:

That from a sworn petition for the fixing of a supersedeas bond filed in the above entitled cause by Pedro M. Porrata, in August, 1943, the following (translated into English) appears:

> "XI. That the commissioner for partition has none of the assets of the estate in his possession, and has no objection to their being administered by their actual executor, Mr. Mario Mercado Riera, by the district court of Ponce through an administrator or by the four heirs, as decreed by the judgment of this Hon. Court; by reason whereof, the amount of the bond to be fixed, in the circumstances, should be purely nominal."
>
> "XII. * * * 2. That movant has none of the hereditary assets in his possession. 3. That movant does not object to the administration of the assets

[62] See footnote 61.

by one or by all the four heirs, by the district court of Ponce or in any other form agreeable to the owners thereof."

That in August, 1943, Mario Mercado Riera filed in the above entitled cause a sworn motion for supersedeas bond in connection with his appeals to the Circuit Court of Appeals for the First Circuit, wherein he inserts a letter addressed to María-Luisa and Adrián Mercado Riera, stating that copy was sent to Margarita Mercado Riera, which letter (translated into English), reads thus:

"My dear sirs:

"This is to inform you that in so far as concerns the estate left at the decease of our father, Mario Mercado Montalvo, I consider myself disconnected therefrom in every sense, except as co-owner thereof, in accordance with what was agreed in the compromise agreement of September 9, 1938, and all business concerning same must be transacted through the heirs and not through its executorship.

"Therefore, and as the undersigned, in connection with said estate, has only exercised the powers conferred on him by the compromise agreement as executor and co-owner thereof, I beg to communicate that I shall notify all persons who hold properties of the estate as lessees or in any other manner, that from this day, instead of transacting business with the succession of Don Mario Mercado Montalvo through the executorship, they must do so with all the heirs as co-owners of the estate.

"Respecting yourselves, on or before September 10, 1943, I shall send you the final supplementary account, advising you that you must begin to provide in accordance with the circumstances, for I consider myself completely disconnected from the collection of debts and payment of obligations of the hereditary estate left at the death of our father, and without any jurisdiction over the estate, except such as refers to the undersigned as co-owner thereof, and such as may result from the

fact that this inheritance was accepted on benefit of inventory.

"I take this step without prejudice to the appeal taken by the executorship from the judgment of the Supreme Court of Puerto Rico dated July 14, 1943, in cases numbered 1516, 1517 and 1518, certiorari, brought by Mrs. María-Luisa and Mr. Adrián Mercado Riera, so as not to have any bearing (acción) on the estate pending the appeal, and of course, under compulsion of the aforesaid judgment.

"Very truly,

"EXECUTORSHIP OF MARIO MERCADO MONTALVO

"By (Sgd) Mario Mercado, Jr.

"Mario Mercado, Jr.
Executor.

"Mmjr-jvd
"2c/o Doña Margarita Mercado Riera
"cc Lcdo. Pedro M. Porrata, Commissioner for Partition."

That dated August 21, 1943, Mario Mercado Riera filed another motion in the above matter, stating that he had mailed, upon August 10, 1943, a letter to debtors, lessees, legatees and other creditors of the estate of Mario Mercado Montalvo, with copies thereof to appellees—

> "advising of the necessity to transact the affairs connected with said estate through the four heirs of the succession of Don Mario Mercado Montalvo, from August 7, 1943, and not through the executorship, as had been done heretofore."

I further certify that the foregoing is a true and faithful translation of the original papers above referred to, as filed in the Spanish language in the above cause and under my custody.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of this Court, in the City of San Juan, Puerto Rico, this 8th day of March, 1944.

JOAQUIN LOPEZ,
Secretary-Reporter,
Supreme Court of Puerto Rico.

SUBJECT INDEX

	Page
Jurisdiction of this court	1-4
Statement of the case	4-12
Argument	12-18
I—Statutes adopted from another jurisdiction carry the interpretations previously placed upon them by the courts of that jurisdiction.	12-15
II—Porrata's litigable interest	5
III and IV—Concerning respondents' argument that federal questions presented here were not raised below	15-16
V—Reply to respondents' Point V	16-18
VI—Reply to respondents' Point VI	18
Conclusion	19
Appendix (Copy of Petition for Rehearing in Court of Appeals)	20-33

TABLE OF CASES

Citizens National Bank v. Opperman, 249 U. S. 448	2
Henrietta Min. & Mill Co. v. Gardner, 173 U. S. 123	12
Hoffman v. Palmer, 129 F. 2d 976	13
Interstate Commerce Com. v. B. & O. R. Co., 145 U. S. 263	12
James v. Appel, 192 U. S. 129	13
Nunez v. Soto Nussa, 14 P. R. R. 190	14
Ortega v. Lara, 202 U. S. 339	14
Ortiz v. Pub. Service Com., 108 F. 2d 815	3
Porrata v. District Court, 53 P. R. R. 140	12
Sanchez v. Cuevas Zequeira, 23 P. R. R. 47	14
Waialua Agricultural Co. v. Christian, 305 U. S. 91	13
Willis v. Eastern Trust & Banking Co., 169 U. S. 295	12

STATUTES

Federal

Organic Act for Puerto Rico, 1917, Sec. 40	12, 13, 16
Organic Act for Puerto Rico, 1900	14

Page

Puerto Rican

Civil Code, Sec. 824 11
Civil Code (Old), Sec. 44 14
Code of Civil Procedure 12

Hawaiian

Organic Act, Secs. 6 and 81 (48 U. S. C. 496, 631).... 13

OTHER AUTHORITIES

Rules 29 and 32 of the First Circuit Court of Appeals. 2,3

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 908.

MARIO MERCADO RIERA, EXECUTOR, ET AL., *Petitioners*,

v.

MARIA LUISA MERCADO RIERA DE BELAVAL, ET AL., *Respondents*.

Petition for Writ of Certiorari to United States Circuit Court of Appeals for the First Circuit.

PETITIONERS' BRIEF IN REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO THE GRANTING OF THE WRIT.

JURISDICTION OF THIS COURT.

In their brief (p. 3), and by their motion appended thereto for dismissal of the petition (pp. 91-92), respondents challenge the jurisdiction of this court to grant certiorari herein, upon the ground that (as they contend) the petition does not affirmatively disclose that it was filed within three months after entry of final judgment in the Court of Appeals.

Apparently respondents do not mean to contend that a timely petition for rehearing filed in good faith in the United States Circuit Court of Appeals, pursuant to its rules, and duly entertained and denied by that court, does not toll the three months limitation on the filing of a petition for certiorari in this court. If any such contention is intended, it is manifestly in direct conflict with the principle long since established by this court in *Citizens National Bank* v. *Opperman* (1919), 249 U. S. 448, 450, namely, that where a petition for rehearing is entertained by the court below the judgment does not become final for purposes of review by this court until such petition has been denied or otherwise disposed of, and the three months limitation begins to run from the date of such denial or other disposition.

As to the remaining question, whether our petition filed herein on March 4, 1946, for a writ of certiorari, makes a showing that the court below "entertained" our petition for rehearing, sufficient to support the jurisdiction of this court under the established principle above mentioned, we think the answer must be yes; because the action of the Circuit Court of Appeals, in receiving (filing) and denying the petition for rehearing, as set forth in our petition for certiorari and the cited parts of the record, necessarily implies consideration, and thus "entertainment," within the meaning of that principle.

This Court will no doubt take judicial notice of the published rules of the court below, and particularly, in this connection, Rule 29 (prescribing the form of all records, petitions, motions and briefs printed for the use of that court, and providing expressly that the clerk shall refuse to receive any petition, motion or brief printed otherwise than in substantial conformation with the rules), and Rule 32 (providing that a petition for rehearing may be filed with the clerk within fifteen days (thirty days in appeals from Puerto Rico) after judgment is entered, that the petition must be printed, and that it must be supported by

a certificate of counsel to the effect that it is presented in good faith and not for purposes of delay.

Therefrom it appears that the court below, by its own rules, expressly authorizes the filing of petitions for rehearing within specified time limits, and conformably to certain other specified conditions, thus in effect tacitly undertaking to entertain such petitions where they comply fully with those rules. That the court below itself shares that view is shown by its opinion in *Ortiz* v. *Pub. Service Com.*, 108 F. 2d 815, from which we quote as follows (p. 816):

> "It may be that where the published rules of court allow the filing of a petition for rehearing within a stipulated time after entry of the judgment, a petition filed within that time will be regarded as 'entertained,' without more, on the ground that the court is bound to give consideration to a petition for rehearing the filing of which has been invited by its rule. See Rules of this court, Nos. 29 and 32."

Had our petition for rehearing failed in any substantial particular to conform to the rules of the court below, it would manifestly have been the duty of the clerk of that court to refuse to receive and file it. Accordingly, our showing of the filing of that petition on December 21, 1945, fully supports conclusions that it was so filed in complete conformity with all of the pertinent rules of that court, and that that court was bound to, and did, "entertain" it.

That the court below did so "entertain" and consider it is still further indicated by its action in disposing of it by a simple unqualified order of denial, which, as above stated, we believe clearly implies consideration of the merits. If the court had regarded the petition as frivolous, dilatory, contemptuous, or otherwise so objectionable in form or substance as to warrant refusal to entertain it at all, it is logical to suppose the action would have taken the form of an order to strike, quash or dismiss the petition, specifying the reason for such disposition; or at least that the order of denial would have included some statement indi-

cating that such disposition was made without consideration of the merits.

To enable this court to judge for itself whether our petition for rehearing, filed December 21, 1945, in the Court of Appeals, was such as to warrant refusal to "entertain" it, we append hereto the full text of that petition (*infra*, Appendix, pp. 20-33), and ask that it be considered as a part of this brief.

We conclude that the challenge of our resourceful opponents to the jurisdiction of this court, on the ground of inadequacy of the showing in our petition for certiorari that it was filed within the time limit prescribed by law, is legally unsound.

STATEMENT OF THE CASE.

Under the general heading "Statement of the Three Cases Involved" (Resp. Br. in Opp. pp. 3-39), respondents devote 36 pages to a garbled restatement of some of the facts set forth in our brief in support of the present petition for certiorari, coupled with allegations of fact not supported by the record, and mixed with profuse arguments, all apparently designed to sustain their contention, and the holdings of both appellate courts below, to the effect that there was no judicial administration of this estate, and, in effect, that every new petition or motion filed by any party in district court case number 782, from beginning to end, constituted or initiated a new and separate proceeding.

Throughout the entire period of more than four years from the official qualification of Mario Mercado Riera as executor on September 1, 1937, until November 26, 1941, when they first advanced their present contention to the contrary, neither of the respondents ever once challenged the legal authority and powers of the executor to hold and administer the property of the estate as a general executor under judicial supervision, or questioned the jurisdiction of the district court in case number 782, to entertain and pass upon every legal question arising in the administration of the estate. For more than two

years after September 2, 1939, when, they now contend, the terms of the executor and partitioner automatically expired by operation of the Civil Code, each and both of the respondents continued uniformly and repeatedly to recognize and invoke the jurisdiction of the district court in case number 782 as a general testamentary proceeding, by filing petitions and motions in that court, duly entitled in that proceeding, relating to the administration of the estate, signed by their attorneys of record in that proceeding, and served on the executor through his attorneys of record therein.

This is shown first by the total absence from the record of any evidence of any such challenge, during that period, to the power and authority of the executor to have the sole official custody and general management of the estate which he was then exercising with the full knowledge of the respondents, or to the general authority and jurisdiction which the district court was then exercising, also with their full knowledge, in that same case number 782, to supervise and administer the estate as in *custodia legis*.

Next it is evidenced affirmatively, so far as concerns the respondent Maria Luisa, by her general appearance in case number 782, through the same attorneys now still representing her in this case, by her petition filed February 21, 1938, entitled "Civil No. 782. Mario Mercado Riera, *Ex Parte*. Letters Testamentary and Executorship," alleging that the executor was in possession of all of the estate, and praying that the court deny the executor any further extensions of time for making the inventory. It should be observed that this petition was served on the executor through his attorneys of record in the same testamentary proceeding, and that, while alleging the executor to be in possession of the entire estate, it embodied no complaint of impropriety in that fact (R. 209-210), although executors have no such power under the Civil Code.

It is further evidenced affirmatively, as regards both respondents, by their participation in the "Contract of Com-

promise" of September 9, 1938, in numerous provisions recognizing expressly or tacitly the sole custody and administration of the estate by the executor, his exercise of various functions not within the power of civil law executors, and, in paragraph (a) Part Third, expressly providing for the filing of the inventory in the district court for the purposes of actions numbers 782 and 1213 (R. 539-546), although no such filing was required by the Civil Code in number 782.

Again it is evidenced convincingly, as to both respondents, by the original proposed final accounts of the executor, copies of which were furnished each of the other heirs by letter of March 6, 1940, showing that the executor had been exercising all of the functions of an executor under the law of special proceedings, including sole custody of the estate, collection of debts due the estate, payment of obligations of the estate, and other powers not within the authority of a civil law executor (R. 234-242); together with the objections to those accounts, formally entitled by number and caption in case number 782, filed in the district court on March 16, 1940, and served, not on the executor in person, but through his attorneys of record in that case, in which there appear various objections to specific credits taken by the executor, but no objection whatever to his exercise of the functions above described, or to his continuance to act as executor after September 2, 1939, and in which the prayer is simply in substance that the objections be sustained, the account be corrected accordingly, and "the executor" be ordered to reimburse the estate by the amounts of the disputed items (R. 225-234). Note that this was eighteen months after the date, September 2, 1939, on which respondents now contend the executorship had expired.

And to the same effect see:

(1) The supplemental objections to final account, filed by these respondents June 7, 1940, in case number 782, similarly entitled, similarly served on the executor through his attorneys, and similarly lacking any suggestion that his office

had expired, or that the district court was without jurisdiction over the estate or the parties in that case, or that this was a new and separate action. (R. 242-244).

(2) The motion to set the objections down for hearing, similarly entitled and served on the executor through his attorneys, filed August 27, 1940, still frankly recognizing both the continued existence of the executorship and of the jurisdiction of the district court over the estate in case number 782 (R. 245-247).

(3) The acceptance by attorneys for Maria Luisa, on December 30, 1940, of service of the executor's motion for authority to borrow money or sell property to pay debts, entitled and filed in case number 782 (R. 307).

(4) The petition for delivery to them of their shares of the estate, filed by these respondents on October 27, 1941, in district court case number 782, duly entitled by number and style in that case, served on the executor through his attorneys of record therein, expressly referring to Mario Mercado Riera in the present tense as "said executor" (R. 348-360).

(5) The motion of Attorneys Zapater and Ochoteco, duly entitled by number and style in case number 782, filed November 18, 1941, with acceptance of service thereon by Jose A. Poventud, as attorney for Adrian Mercado Riera, on that date (R. 366-369).

(6) The motion of the executor, filed November 21, 1941, for authority to use certain funds on deposit and sell certain property to pay legacies, bearing acceptances of service by Celestino Iriarte, as attorney for Maria Luisa, on November 18, 1941, and Mr. Poventud, as attorney for Adrian, on November 19, 1941 (R. 377-379). It should be observed that it was not until December 14, 1942, more than a year later, that the respondents, through those same attorneys, filed their motion to quash the service thus accepted by their said attorneys (R. 461-462).

As examples of many wholly unsupported and erroneous averments in the "Statement" of respondent's brief, we cite the first two paragraphs under the subtopic "Certiorari No. 1517," etc., on page 13, where respondents, referring to their petition of October 27, 1941, for immediate delivery to them of their shares of the estate (*supra*, p. 7), describe that petition as one "for the surrender or delivery to the heirs and co-owners of the properties of the estate," declare (in italics!) that "this proceeding [i. e. their original petition and the ensuing Certiorari No. 1517] arose out of sections 832 and 833 of the local Civil Code" [those sections name certain contingencies in which executorships administered solely under that Code terminate and their functions devolve upon the heirs], and later refer to their original petition as one "for the return *to the heirs* of the hereditary assets." The facts in that regard, as can be readily verified by reference to their said petition (R. 348-360), are that respondents did not anywhere in that petition mention those sections of the Civil Code, under which they now claim it was brought, did not anywhere therein allege that the executorship had expired, did not even allege therein the basic facts that would have been necessary to bring the executorship within the application of those sections of the Civil Code, and, even more significantly, did not even pray for delivery of the estate or of the functions of the executorship to all of the heirs jointly, but only (R. 358; italics ours):

> "(1) With respect to aforesaid hereditary properties, community properties, rights and choses in action *belonging to these petitioners* and in the power of Mario Mercado Riera, *petitioners pray the court to order the said Mario Mercado Riera to deliver them to or make available to aforesaid petitioners* together with the corresponding titles, papers or documents;"

Even in their motion, filed November 26, 1941, to quash service on them through their attorneys of the motion of Attorneys Zapater and Ochoteco to fix fees (R. 380-381),

which led to the certiorari proceeding numbered 1516 in the insular supreme court, and in which for the first time respondents raised their belated contention that the executorship had expired in 1939, then two years and more past, respondents did not pray for delivery of the estate and functions of the executorship to the heirs, but only that the court quash the mentioned service; and this is equally true of their motion of December 14, 1942 (R. 461-462), to quash the service upon them accepted by their attorneys more than a year before, of the executor's motion [petition] for authority to use certain assets of the estate to pay legacies, which led to the proceedings in insular supreme court number 1518.

[Thus, incidentally, it appears conclusively from the record that the judgment of the insular supreme court in Certiorari Number 1517, and the corresponding affirmatory judgment of the Circuit Court of Appeals, grant relief to the respondents for which they did not pray in the court of first instance, namely, an order directing the executor to deliver the estate and the further execution of the will to all of the heirs jointly, without regard to the formal distribution required by the will, the law, and the written contract of the parties, and without regard to the orderly settlement of the estate].

Also confusing and misleading is respondents' argument (Br. in Opp., p. 20), to the effect that Mr. Porrata, by his alleged voluntary intervention in the insular supreme court in case number 1517, invoked its jurisdiction on the merits to set aside the writ of review, and was, therefore fully heard in every respect. In support of that proposition respondents cite in a footnote (No. 17, p. 20), some Puerto Rican Supreme Court and federal court cases, including two decisions of this court, relating without exception to the status of an intervenor before a court or tribunal of first instance, and having no logical bearing on Porrata's standing as a party when, after being served with process, he intervened in the insular supreme court, to protect himself

against the attempt of these respondents to have his status and rights as partitioner of the Mercado estate adjudicated there upon a record of proceedings in the trial court in which he had had no opportunity to present his evidence or be heard at all. Do respondents mean by this devious argument to contend that because Porrata, after having been formally served by the respondents with their petition and writ in Certiorari No. 1517, intervened in this case in the insular supreme court, and was heard in argument before that appellate tribunal, he had no right to appeal from its judgment to the Court of Appeals, and has no right to ask this court to review by certiorari and reverse the refusal of that court to entertain his complaint of lack of due process in the judgment of the insular supreme court against him? Do they mean to contend that Porrata, by his intervention and argument before the insular supreme court, waived the very right for which he was contending—the right to due notice and hearing in the trial court? If so, their contention is manifestly absurd. If they do not mean to so contend we are at a loss to understand the purpose of the argument, unless it be to obscure the real question Porrata presents here, which is simply whether the insular supreme court, upon review by certiorari of the proceedings of a district court, can lawfully enter judgment against a party who was accorded no notice or hearing in the district court upon the issues adjudicated against him by the supreme court. See Petition and Supporting Brief herein, Point III, pp. 39-61, and Porrata's separate Brief in Reply to Respondents' Brief in Opposition.

Referring to respondents' statement on page 29 of their brief in opposition, that petitioners herein seem to intimate that there was only one case below affecting the administration of the estate, petitioners disclaim any such intimation. As we have clearly shown in our petition for certiorari, under "Chronology," pages v to xii, there were precisely four separately numbered cases, all initiated by various parties within a few months after the death of the testator, namely:

Civil No. 764, initiated August 28, 1937, by the petition of Benigno Fernandez Garcia, custodian of the will, presenting the will for examination, probate and registration (R. 498-500).

Civil No. 782, initiated September 1, 1937, by the petition of Mario Mercado Riera, executor, for letters testamentary (R. 191-192).

Civil No. 802, initiated September 8, 1937, by the petition of Pedro M. Porrata, testamentary partitioner, for judicial credentials as such (R. 793-794).

Civil No. 1213, initiated by Adrian Mercado Riera, one of the heirs and one of the present respondents, by petition filed January 24, 1938, praying that he be adjudged an acceptor with benefit of inventory.

Of the four separately numbered cases above mentioned, number 764 was finally adjudicated and closed by admission of the will to probate and registration on August 30, 1937 (R. 521-523); number 802 was finally adjudicated and closed by issuance of the judicial credentials sought by Mr. Porrata therein, on September 8, 1937 (R. 793-794); number 1213 was finally adjudicated and closed by the district court's order of September 12, 1938 (R. 891-892); and number 782, from that time on to the present day, has remained the sole and only separately numbered and styled proceeding in the district court relating to the executorship and the estate here involved, and has been the proceeding in that court in which every party concerned, including these respondents, uniformly have entitled and filed all motions, petitions and papers whatsoever concerning the administration of the estate, requiring judicial attention or action.

It is true that in the early days of the executorship, Petitioner Porrata believed and unsuccessfully contended that the executorship was of the Civil Code type, limited in its powers by section 824 of that Code (Pet. and Br., App., p. 89), precisely as these respondents are now contending, but that contention was then opposed by these respondents, and was in effect overruled by the district court on March 2,

1928 (R. 811-812), by the decision upheld by the insular supreme court on April 29, 1938, in *Porrata* v. *District Court,* 53 P. R. R. 140. Thereupon Mr. Porrata accepted the views of the district and insular supreme courts in that regard, and has ever since considered and treated the executorship as one under judicial administration, and the estate as in *custodia legis,* according to the pertinent provisions of the Code of Civil Procedure, a view which the executor, the district court and all concerned, excepting these respondents, have ever since held, and which even the present respondents obviously shared until they suddenly found it expedient to assert a different contention in this litigation on November 26, 1941, more than three and a half years later.

ARGUMENT.

I.

A. Respondents (Br. in Opp., p. 40-43) characterize as "timid" our statement (Pet. and Br., p. 26, par. G) that it is of course to be presumed that the Congress, in directing by Section 40 of the Organic Act that the jurisdiction and procedure of the insular courts should continue as then provided, intended to continue then existing pertinent laws in effect, with the judicial interpretations that had theretofore been put upon them by the courts, and respondents challenge the soundness of that view.

The principle to which we there referred is well settled. It has been applied by this court in holding that a statute adopted from another state will be presumed to have been adopted with the construction previously placed upon it by the courts of that state, *Henrietta Min. & Mill. Co.* v. *Gardner,* 173 U. S. 123; *Interstate Commerce Com.* v. *Baltimore & O. R. Co.,* 145 U. S. 263; and that when the Congress adopts a statute substantially as it exists in the legislation of a state, it adopts also the known and settled construction given to it by the courts of that state. *Willis* v. *Eastern Trust & Banking Co.,* 169 U. S. 295.

A more recent application of the same principle appears in the 1942 opinion of the Second Circuit Court of Appeals in *Hoffman* v. *Palmer*, 129 F. 2d 976 (affirmed, 318 U. S. 109), where the court, referring to an act of Congress adopted verbatim from New York State legislation, declared (p. 985):

> "It is a general rule that where a statute has been previously enacted in another jurisdiction, interpretations by its courts before its enactment in another jurisdiction are to be followed because the statute 'generally is presumed to be adopted with the construction which it has received.' Holmes J., in James v. Appel, 192 U. S. 129, 135."

Respondents (Br. in Opp., pp. 42-43), cite Sections 6 and 81 of the Organic Act of Hawaii (48 U. S. C. 496 and 631), continuing in force the laws and tribunals then existing, and argue that notwithstanding those sections, this court has always accepted decisions of the Hawaiian Supreme Court, as stating the law of that territory, citing *Waialua Agricultural Co.* v. *Christian*, 83 L. Ed. 61, 72 (305 U. S. 91, 109). The implication from this argument would be that the respondents intend to say that this court held in the cited case that the meaning of local Hawaiian statutes as construed by local courts at the time of the adoption of the Organic Act of Hawaii, could be changed by rulings of the Hawaiian Supreme Court rendered subsequent to such adoption. Such a contention is wholly unwarranted. That case did not involve any issue of the effect of the cited provisions of the Organic Act of Hawaii at all comparable to the issue raised in this case with relation to the effect of Section 40 of the Puerto Rican Organic Act. Furthermore, all that this court said in that case about the weight of holdings of the Hawaiian Supreme Court was simply (305 U. S. 109; italics supplied):

> *"In so far as the decisions of the Supreme Court of Hawaii are in conformity with the Constitution and applicable laws of the United States and are not mani-*

festly erroneous in their statement or application of governing principles, they are to be taken as stating the law of the Territory."

B. Equally inapposite here is *Ortega* v. *Lara,* 50 L. Ed. 1055 (202 U. S. 339), which is cited by respondents (Br. in Opp., p. 43), to the proposition that the saving provisions of the first Organic Act for Puerto Rico, approved April 12, 1900, did not make Federal statutes out of the local laws thereby continued in effect. The local statute involved in that case (Section 44 of the Old Civil Code) *had been repealed by the legislature* before the alleged cause of action arose, and so could not provide a basis for any claim of any kind, to say nothing of a claim of deprivation of any right under federal law. It is true that the court remarked incidentally, and clearly as dictum, in substance, that it did not believe the savings provisions had transformed the local statutes continued in effect into federal statutes, and we have no quarrel even with that dictum. Here we are dealing not with a mere saving clause, but with Section 40 of the Organic Act of 1917 (Pet. & Br., p. 22), relating specifically to the jurisdiction and procedure of Puerto Rican courts, and prescribing in mandatory terms that such jurisdiction and procedure should continue as then provided by law, until otherwise provided by law.

Our learned opponents argue (Br. in Opp., pp. 44-45), that the insular supreme court had, prior to enactment of the Organic Act of 1917, held that its power to grant review by certiorari is *discretionary,* the inference apparently sought to be conveyed by this argument being that the court had held that it could grant certiorari in any case at its discretion. However, an examination of the cases cited by respondents to that proposition, namely *Nunez* v. *Soto Nussa, District Judge* (1908) 14 P. R. R. 190, and *Sanchez* v. *Cuevas Zequeira* (1915), 23 P. R. R. 47, reveals that neither sustains that proposition. In the Nunez case, the court simply held that the existence of a remedy by appeal or writ of error did not bar certiorari in an otherwise proper

case. In that case the court granted certiorari to review a judgment of the district court committing the petitioner to jail for alleged contempt in violating an injunction void because issued without jurisdiction. The opinion says nothing about the granting of the writ being discretionary in all cases. Similar remarks apply to the *Sanchez* case. There too the court entertained certiorari to grant relief from a void injunction, and simply held again that the existence of a right of appeal did not bar certiorari in the special and emergent circumstances of that case.

II.

Respondents' Point II (Br. in Opp., pp. 47-54), asserting Petitioner Porrata to be without reviewable interest, etc., is fully treated in our Petition and Supporting Brief, under the heading "Opinion of Circuit Court of Appeals" (pp. 51-57), and in the accompanying separate Brief of Petitioner Porrata in Reply to Respondents Brief in Opposition.

III.

Respondents argue (Br. in Opp., pp. 54-58) that no federal question was properly raised in, or even passed upon by, the insular supreme court.

In so far as this argument relates to the federal constitutional question presented here by the Petitioner Porrata (Pet. and Br., Point III, pp. 39-61), our reply appears in the accompanying separate reply brief filed herein on behalf of Mr. Porrata, at pages 7-8 and 17-18.

So far as the argument relates to Petitioner Mercado, and the two federal questions presented on behalf of both petitioners jointly in our Petition and Supporting Brief, Points I (pp. 22-33) and II (pp. 33-39), we beg only to remind the court that both are questions of the lawful jurisdiction of the insular supreme court under federal law, over the subject matter of this case. It need hardly be said that this court can take notice of a lack of jurisdiction of the subject matter, on the part of any subordinate court, regardless of whether the question was raised below. Such a lack of juris-

diction cannot be waived or supplied, even by express agreement of the parties, much less by a simple failure of a party to observe and object to it at the time. The court will take notice of such a lack of jurisdiction in any case at any time, and it is its duty to do so, upon the suggestion of any of the parties, or even upon its own motion whenever detected. We consider these principles too well established to call for further argument, or the specific citation of precedents.

IV.

Respondents' Point IV (Br. in Opp., pp. 59-61), is devoted to an effort to meet our Point II (Pet. and Br., pp. 33-39), dealing with the second of the federal questions presented by petitioners here, namely that even if the insular supreme court be held to have had jurisdiction to review and annul the district court orders in question, it certainly had no power under Section 40 of the Organic Act to substitute for one of them its own order directing disposition of the estate.

Respondents here again reiterate their objection to consideration of that point by this court on the ground that the question was not raised before the insular supreme court. As the question is one of the jurisdiction of the insular supreme court over the subject matter of this case, what we have just said in that connection under III above, applies here; that is, in substance, that such a question can be raised at any time and a failure to raise it below is no bar to its consideration here.

As to the remaining argument presented by respondents on this point, it does not appear to us to be logically responsive to what is said on the subject in our petition and supporting brief, and we do not regard any part of it as of sufficient merit to call for reply.

V.

Under the corresponding subdivision V of their brief in opposition, respondents first take issue with our statement (Pet. and Br., p. 38, par. g), that the insular supreme court,

while holding in effect that the district court had never had, or had long since lost, jurisdiction over the estate [in case number 782], nevertheless undertook simultaneously to assume that very jurisdiction over the estate which it was holding the district court did not have, and to enter judgment in the same testamentary proceedings which, according to its theory were not lawfully in court, directing the executor (former executor according to its theory) immediately to surrender custody of the estate to the heirs jointly. Respondents declare that statement to be hesitating, argumentative and quite erroneous, but then proceed to quote from the opinion of the insular supreme court a passage which, considered with its context, fully proves the truth of our statement.

Of course, in that statement, we were not contending, as respondents apparently profess to believe we were contending, that the insular supreme court opinion holds the district court to have been without general power to accept and exercise jurisdiction over any other separate proceedings affecting this estate which might have been properly initiated. What we were contending, and we confidently reiterate the contention here, was that the insular supreme court held the district court without jurisdiction in its testamentary proceeding number 782 to deny the petition and motions in question, because, according to the theory of that court, the executorship and estate were not under judicial administration in that proceeding. As above indicated, that view of the substance of the holding is amply borne out by the whole opinion of that court, and particularly by the extract quoted by respondents.

Nevertheless, the insular supreme court inconsistently and erroneously undertook to assume and exercise an administrative jurisdiction over the estate which it could have derived only through the district court, and which it was simultaneously holding the district court did not possess, namely jurisdiction in that same proceeding to supervise the executorship, and actually to direct disposition of the estate by the executor.

We find nothing further under respondents' Point V which, in our opinion merits reply, except certain contentions relating to Petitioner Porrata's status, rights and duties, which are fully dealt with in Porrata's separate reply brief filed herewith.

VI.

Under this heading in their brief in opposition (pp. 76-89), respondents assail our Point IV (Pet. and Br., pp. 62-76), to the effect that even as a matter of purely local law the judgment of the insular supreme court was patently and inescapably wrong, and their attack consists mainly of copious quotations from the opinion of the insular supreme court in this case, with supplied emphasis here and there. Petitioners freely concede that the opinion and judgment of that court were in favor of the respondents.

The only argument we find worthy of reply under Part VI of the opposing brief is respondents' declaration that it is the settled rule in Puerto Rico that a judicial administration for a hereditary estate can never arise there by estoppel or implication, but must be applied for by petition setting out the necessary and jurisdictional facts, and must always be judicially decreed (Br. in Opp., p. 85).

To that proposition respondents cite seven insular supreme court cases, each citation followed by a parenthetical comment purporting to state the holding. Attention is invited to the fact that even according to respondents' parenthetical comments last mentioned, not one of these cases provides any tangible support for the broad rule asserted by respondents. Upon actual examination of the cases we reach the same conclusion. Not one of them even mentions estoppel, or deals with any issue at all comparable to that raised in this connection by these petitioners.

CONCLUSION.

The petition should be granted, and in due course the judgments of the Court of Appeals and insular supreme court should be reversed.

Respectfully submitted,

FRED W. LLEWELLYN,
PEDRO M. PORRATA,
Attorneys for Petitioners.
336 Southern Building,
Washington, D. C.

LEON, WEILL & MAHONY,
Of Counsel.

APPENDIX.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1943.

No. 3960.

MARIO MERCADO RIERA, EXECUTOR, ET AL., *Appellants*,

v.

MARIA MERCADO RIERA DE BELAVAL, ET AL., *Appellees*.

Consolidated Appeals from the Supreme Court of Puerto Rico.

Judgments, July 14, 1943.

PETITION FOR REHEARING AND MOTION FOR STAY OF MANDATE.

Prayer and Motion.

The appellants, Mario Mercado Riera, Executor, and Pedro M. Porrata, Partitioner, by their undersigned attorneys, hereby respectfully petition for a rehearing of this case and reconsideration of the opinion and judgment entered herein on November 23, 1945, upon the grounds below indicated, and also move that, in event of denial of this petition, issuance of the mandate herein be stayed to enable the appellants, within the time allowed by law, to submit to the Supreme Court of the United States a petition for a writ of certiorari to review the judgment of this court in this case.

Grounds for Petition.

In General.

Referring to the advance pamphlet edition of the opinion of this court, initially to that part on pages 14 and 15, dealing with the first of the federal questions involved, appellants believe the court has not grasped the precise nature or full scope of the question sought to be presented, and has thus fallen into the error of dismissing it without due consideration of important factors that should influence the decision.

It is not merely the form of procedure of the insular courts that appellants contend was in effect crystallized, subject only to statutory amendment, by Section 40 of the Organic Act of March 2, 1917. It is also the more important "judicial power" or jurisdiction of those courts, as prescribed by the laws then in force in Puerto Rico and prior judicial interpretations of those laws, which appellants believe was so crystallized or fixed. In other words, appellants' argument is not merely that the Supreme Court of Puerto Rico violated the Organic Act in matters of procedure by granting certiorari here, but also that that court was wholly without jurisdiction to grant certiorari here by reason of the limitations imposed by that Act.

This court declares in substance that it does not construe the Organic Act as crystallizing insular procedure. Characterizing the pertinent language of that Act as brief and general, this court states that it cannot draw therefrom the inference that Congress intended strictly to limit the Supreme Court of Puerto Rico only to such procedure as was in vogue on the date of the Organic Act; and that, instead, this court thinks that Congress in Section 40 of that Act intended merely to provide a basic procedure which, within constitutional and statutory limits, the insular courts, like courts administering the Common Law, could develop as they see fit.

As to whether this court entertains similar views regarding the effect of the limitations imposed by Section 40 on jurisdiction, the opinion is silent. However, since the terms of the statute relating to judicial powers are precisely the same as those relating to procedure, it seems properly inferable that the court does regard the statute as equally elastic in that direction.

In any event, except for its bare reference to the brief and general language of Section 40, the opinion reveals no statement of the reasons for its above-indicated conclusions.

True the language of Section 40 is brief, and perhaps in a sense general, but it is none the less plain and mandatory in its provision that: "*The jurisdiction of said courts and the form of procedure in them, . . . shall also continue to be as now provided until otherwise provided by law.*" Does this positive mandate leave any room for judicial interpretation of the quoted words as affording latitude to the insular courts to expand or shrink their own powers to suit their views of fit development of procedure or to meet any other exigency? Appellants can perceive none. Moreover the mandatory intent of the provision is further convincingly evidenced by the immediately ensuing provision, expressly investing the Legislature of Puerto Rico with authority, from time to time as it might see fit, to organize, modify, or rearrange the courts and their jurisdiction and procedure.

We do not overlook the phrase "within constitutional and statutory limits", by which this court qualifies the extent to which it declares it believes Congress intended to permit the insular courts to go in developing their procedure as they might see fit. In its context that qualification appears somewhat cryptic. We do not contend, and we presume no sensible person would contend, that constitutional and statutory limitations generally, or those with which we are concerned here, leave no scope whatever for court rules and decisions affecting judicial procedure. However, the question here is whether in this instance the Supreme

Court, in granting certiorari, did or did not violate and exceed limitations upon its powers and procedure definitely imposed by the Organic Act.

Manifestly, it is no answer to that question to say that the Organic Act permits the insular courts to do things about procedure which are not forbidden by law. The question is answered by this court with a blunt declaration in substance, as we understand the opinion, that the insular Supreme Court did not violate the Organic Act by granting certiorari herein, even if it had according to its own prior decisions possessed no power to grant certiorari in such a case at the time of the adoption of the Organic Act. Such an answer, we respectfully reiterate, is in direct conflict with the plain terms of Section 40 of that Act, and calls urgently for reconsideration and modification.

Referring to that part of the opinion on pages 15 to 19, holding in substance that, as a matter of purely local law the Supreme Court of Puerto Rico has jurisdiction under the insular statute (Sections 670 and 671, Code of Civil Procedure), to issue writs of certiorari to correct errors of inferior courts regardless of the nature of the error alleged, and therefore was not clearly in error in granting certiorari here, appellants believe that conclusion does violence to the very terms of the cited statute, which clearly define the writ as one to be sent by a superior to an inferior court in cases "where procedure is not according to the course of the law," and thus, in our opinion, clearly bar the employment of this form of review for alleged errors other than those of procedure.

We do not need to resort here to modern distinctions between adjective and substantive law. It is the basic statute itself that makes the distinction on which we rely, namely the distinction between procedural errors, such, for example, as deprivation of notice and hearing, on the one hand, and, on the other, errors of law committed in the course of an otherwise orderly and regular course of adjudication.

That the Legislature of Puerto Rico definitely intended to make such a distinction here is convincingly demonstrated, we think first by the employment of the specific word "procedure" in the above-quoted phrase; next by the extraordinary and summary nature of the remedy created, its common law characteristics, the inherent distinction between it and the ordinary appeal, and the absence of any reference in the statute to errors other than those of procedure as a basis for invocation of the remedy; and finally by the employment in the above-quoted phrase of the expression "not according to the course of the law."

With particular reference to the expression last quoted, it is unquestionable that the words "the course of" were inserted in the phrase for some definite purpose. They cannot be ignored, or construed to mean nothing, for that would contravene a fundamental principle of statutory construction. What, then, did the lawmaking body mean by saying "according to the course of the law," instead of saying simply "according to law?" We believe it is logical to answer that the words "the course of" were inserted to avoid the very interpretation adopted by this court, by the use of an expression clearly connoting the laws governing the course of orderly procedure followed by courts to assure due process of law; the legislature intending thus to make doubly plain its previously indicated intent that the authorized remedy is not to be available as a substitute for appeal to review alleged errors of law other than those of procedure.

We readily concede, as this court indicates, that the extraordinary writ of certiorari is especially appropriate where otherwise applicable, if the erroneous action of which the petitioner complains is alleged in good faith to have been beyond the legal power of the court by which it was taken. However, this does not grant that certiorari lies to bring up to the Supreme Court of Puerto Rico any case in which a petitioner may choose to attack the jurisdiction of an insular district court. The remedy in such a case re-

mains by appeal, unless the other special conditions necessary to warrant resort to the extraordinary method of review by certiorari are present. Otherwise, every defendant desiring to evade or delay justice could halt proceedings in the trial court for an indefinite period by the simple expedient of a petition for certiorari alleging errors of law ordinarily reviewable only on appeal, and coupling therewith a challenge to the jurisdiction of that court; a result obviously not contemplated or permitted by the law.

On page 19 of the opinion, among the grounds stated for the view that there was no abuse of discretion on the part of the insular Supreme Court in granting the writs of certiorari, this court mentions "the fact that a jurisdictional error of the District Court of Ponce is alleged," explaining parenthetically that "if case No. 782 automatically expired with the termination of the executorship on September 1, 1939, the district court had no jurisdiction to consider motions filed in that case thereafter."

In that connection appellants wish to remind the court that the appellees continued for more than two years after September 1, 1939, to recognize and treat the executorship as still in existence, and continued during that period to recognize the continued authority and jurisdiction of the district court to administer the estate in case number 782. It was not until November 26, 1941, that they first belatedly advanced their theory that the executorship had expired in 1939; and they never at any time prior to filing their petitions for certiorari in the insular Supreme Court made any contention that case number 782 had expired automatically with the belatedly alleged termination of the executorship. As late as October 27, 1941, in their petition for delivery of the estate to the heirs (R. 348-359), they submitted unqualifiedly to the jurisdiction of the district court in that case, and did not even suggest that the executorship had been terminated.

It seems paradoxical indeed to hold that a litigant can submit a motion or petition to an insular district court, call-

ing not for dismissal for lack of jurisdiction but for affirmative administrative action, and when the application is denied there, secure a review of that decision by the insular Supreme Court upon certiorari, by alleging that the district court was without jurisdiction to entertain the motion or petition at all. Equally paradoxical it appears, to hold that an insular district court was wholly without jurisdiction to entertain such a motion or petition, and yet that the insular Supreme Court, upon review by certiorari, could by judicial decree empower and order the powerless district court to grant the same motion or petition. Nevertheless, such are the apparent results of the judgments under review, and of the present opinion of this court.

In regard to this court's holding that as a matter of local law the ruling of the insular Supreme Court, to the effect that a petition under Section 556 of the Code of Civil Procedure constitutes a *sine qua non* of judicial administration, is not patently erroneous; while appellants think that holding wrong, they do not wish to burden the court with a mere reiteration or elaboration of such of the reasons for a contrary view set forth in their briefs previously submitted herein, as have been noted and overruled in the opinion of this court.

There is, however, a matter of special importance in that connection which is not mentioned in the opinion, and which therefore may have been overlooked. We refer here to the Brief for Appellant Mercado, Point Four, subdivision A, pages 46 and 47, quoting two separate insular statutes, each requiring in mandatory terms the judicial administration of estates under circumstances like those of the Mercado estate here involved. Considering those statutes, together with the long continued recognition by the district court and all parties concerned, of the judicial nature of the administration of the Mercado estate, and the other considerations presented by appellants' briefs in that connection, we are unable to perceive any reasonable ground for a conclusion that the ruling of the insular Supreme Court is not clearly and patently erroneous.

Jurisdictional and Other Questions Raised by Porrata.

As to the position taken by this court with relation to the appeal of the appellant Porrata in Puerto Rican Supreme Court No. 1517, appellants feel obliged respectfully to protest that it fails to meet or encompass the issues presented by that appeal.

Although Porrata's name is not expressly mentioned in the body of the judgment from which he appeals; and although upon a superficial examination of that judgment it may appear that it is directed exclusively to the executor; nevertheless it will be found that Porrata's name does appear in the preceding title of the case (omitted from the printed record) as one of the parties in the case adjudicated, and he was in fact a party to the case before the insular supreme court by reason of the service on him of the petition and writ, and by reason of his special appearance, answer and presence throughout the hearing in that court. This is conclusively borne out by the action of the insular supreme court in passing upon Porrata's rights in the findings and conclusions of its opinion, and in beginning its judgment with the words: "For the reasons set forth in the foregoing opinion."

Inherent in that judgment, are the findings and conclusions on which it is based, including: (1) *that the testimentary executorship and partitionership automatically expired in 1939;* (2) *that the partitioner failed to discharge his duties as such within the time allowed by law or the compromise contract of 1938;* (3) *that the compromise contract itself fully accomplished the requisite partitioning of the estate;* (4) *that no further partitioning or distribution of the estate was or is necessary,* and (5) by necessary implication that Porrata did not even earn or become legally entitled to payment of the fee of $20,000 payable to him under the compromise contract for his services as partitioner.

Those findings and conclusions are manifestly and patently erroneous, and the judgment they purport to support is inescapably wrong, but more important still, the Supreme

Court was without jurisdiction to make such findings and conclusions at all because Porrata had not been heard in the trial court. The executor could not validly execute such a mandate without the partitioning and distribution of the residuary estate by Porrata as directed by the testator, prescribed in the compromise contract, and required by law. Porrata manifestly was a necessary party to the proceeding of the objecting heirs to enforce immediate delivery of the estate, but had no hearing in that proceeding in the trial court where, and only where, his pleadings and evidence could have been received.

Incidentally the considerations just above outlined completely distinguish this case from *Boston Tow Boat Co.* v. *United States,* 321 U. S. 632. There no judgment had been passed against the Boston Company in the district court. No attempt had been made there to adjudicate its rights. Here the lower court treated Porrata as a full fledged party and undertook to pass judgment against him, notwithstanding his protest that he had not been heard in the trial court; a plain error due no doubt in large part to the attempt of the insular supreme court to review this case by the hasty and extraordinary procedure of certiorari.

True, Porrata has been paid the amount of the fee in question, by the executor, but the item in the executor's accounts representing that payment has already been challenged by the appellees here (Br. for Appellees, Sub-Appendix No. A-1, pages 116-119), and Porrata faces the prospect of a demand and suit for refund of the amount, subject to ultimate adjudication by a court already practically committed by its opinion and judgment in this case, in which Porrata had no day in the trial court, to render judgment against him. Incidentally, in view of the considerations just noted, is it not manifestly unjust and misleading for this court, while declining to decide or even discuss the Constitutional question raised by Porrata, merely to say, as it does in the opinion under discussion, that Porrata says he has divided the estate among the heirs according to

the compromise contract, and admits that he has been paid for so doing?

In his last will and testament, Mario Mercado Montalvo, the decedent, entrusted to Porrata, as his "intimate friend," the duty of partitioning his residual estate among his heirs in accordance with the terms of his will. Porrata accepted that trust and undertook in good faith to fulfil it. The estate was large and diversified, the task correspondingly long and difficult, and the incidental responsibilities heavy. However, Porrata completed the work of preparing a draft of the proposed partition deed, and transmitted copies thereof to the several heirs on March 14, 1940. The two heirs who are the appellees here promptly objected to numerous parts of the draft, and refused to join in a formalization of the deed, or even to attend a conference with Porrata and the other heirs for the purpose of settling differences, and reaching a final agreement on the draft. They have consistently maintained the same attitude ever since.

The result is that, through no fault of Porrata, he has thus far been unable completely to fulfil his obligations to his dead friend, or to the heirs under the compromise contract. If the judgment from which he appeals, as interpreted by the court that rendered it, is permitted to stand, it is apparent that that obligation can never be completely fulfilled, for the judgment in effect declares the testamentary partitioner, along with the executor to have long since become *functus officio*. Consequently that judgment leaves the complex details of the distribution of the estate, as well as many other related controversial matters (all of which might and should, in the real interests of all concerned, be settled or adjudicated in one orderly proceeding), in a state of "confusion worse confounded," to be the subject of multiple, protracted, and expensive lawsuits, the probability of which has been definitely recognized by this court.

It should be borne in mind that the basic question raised by Porrata here is not one of local law, but is the constitutional and federal statutory question whether the

judgment of the insular Supreme Court deprives him of due process of law, by adjudicating his rights, duties and obligations without due notice and hearing. The rule of deference to the insular Supreme Court in matters of local law therefore has no application in the determination of that question. The familiar formulas "patently and clearly erroneous" and "inescapably wrong" cannot be used in disposing of that question. The test is simply whether the lower court erred in the particular indicated.

Nor do we understand this Court's statement in its opinion (p. 23) that "Porrata's presence here is not easy to understand." The facts upon which Porrata's appeal to this court is based are comprehensively outlined in his brief (Br. for Appellant Porrata, pp. 3-17), but we think it may tend to clarify his position here to restate briefly some of the more salient ones, as follows:

(1) Porrata was appointed testamentary partitioner in the decedent's will (R. 513);

(2) The four Mercado heirs, including the two appellees here, on September 9, 1938, joined with Porrata in the execution of the contract of compromise, under which Porrata incurred certain obligations and acquired certain rights (R. 524-558);

(3) The present appellees on October 27, 1941, petitioned the District Court of Ponce for immediate delivery of the estate to the heirs on the basis of the same contract of compromise, attaching a copy thereof to their petition, and quoting parts thereof, including those parts relating to Porrata's rights and duties (R. 348-359);

(4) Porrata on November 26, 1941, sought to intervene in that proceeding for the protection of his interests, serving on each of the heirs, and filing in the district court his "Report of the Testamentary Partitioner," with a copy of his draft of proposed partition deed attached, and requesting a hearing (R. 385-395);

(5) Appellees on December 4, 1941, moved to quash service on them through their attorneys, of Porrata's "Report" and petition to be heard above mentioned (R. 396-397);

(6) On December 14, 1942, at a hearing of which Porrata was not notified (R. 460) and at which he did not appear, the district court heard the petition for immediate delivery of estate and took it under advisement (R. 462-464);

(7) On March 24, 1943, the district court denied the petion for immediate delivery of estate (R. 467-476), expressly reserving judgment on Porrata's "Report," stating (R. 475):

> "We believe that no order should be entered with respect to the partitioner's report because, first, the motion with respect to the quashing of the notice of the partitioner's report heretofore set forth has not been argued, and second, because in order to order either one or the other, as the parties may request, it is necessary, first, to consider whether the partitioner had any just cause for rendering his report to the coheirs on the date upon which he did so, and for that it is necessary that the partitioner and the objecting coheirs put the court in a position where it could decide this matter of fact. Both in this action as well as Number 1213, acceptance with benefit of inventory, etc., the Honorable Judge Sepulveda reserved to the partitioner his right to allege whatever he deemed convenient 'in accordance with his duties and office'."

(8) Porrata was formally notified of the judgment last above mentioned, with copy thereof (R. 476).

(9) Appellees on April 22, 1943, caused to be served upon Porrata, a copy of their petition for certiorari in Supreme Court Number 1517, together with a copy of the writ issued thereon (R. 61-64).

(10) On May 24, 1943, Porrata filed in the Supreme Court in Number 1517, his "Special Appearance for the Purpose of Raising a Constitutional Question," pointing out that the

petitioners were seeking to have that court pass upon his duties and functions as partitioner of the estate, and that he had had no hearing on this matter in the district court, alleging that certiorari was not the proper remedy, and moving to quash the writ on the ground that to uphold the same would deprive him of due process of law in violation of the Organic Act and the Constitution of the United States (R. 67-69).

(11) Ignoring completely the Constitutional question raised by Porrata, the insular Supreme Court proceeded to pass upon his official status, rights and duties, as follows:

> "In another proceeding, case No. 802 of the lower court, instituted by Pedro M. Porrata, the latter obtained a judgment, on September 8, 1937, acknowledging his authority as Commissioner, and in that same proceeding the court granted him an extension until September 6, 1939, to perform his functions. Since then he has not been granted any further extension" (R. 100).
>
> • • •
>
> "Nor can it be maintained that the term of the executor [partitioner] is still in force and that the petition should be made in accordance with the draft of partition prepared by him. As we have stated, the executor [partitioner] in the present case was granted by the lower court an extension until September 6, 1939, to fulfil his office. He has neither sought, nor has he been granted, any additional term" (R. 100).
>
> • • •
>
> "They [the heirs] apportioned among themselves the hereditary estate (subdivision (f) of the compromise contract) and the commissioner of partition, having this in mind, and, moreover, the fact that the heirs had 'agreed regarding the form and terms of the partition or distribution of the estate' (subdivision (l), compromise contract), likewise consented to said contract. Neither the executor nor the commissioner complied, either within the terms fixed or subsequently, with the terms of the contract" (R. 116).
>
> • • •

"If the heirs in the case at bar had already accepted the inheritance and agreed upon its distribution, pursuant to the compromise contract of September 9, 1938, the fact that the executor and the commissioner of partition had failed to perform its terms should not be ground for claiming, several years afterwards, that the heirs are not in agreement as to the way in which they should distribute the estate among themselves" (R. 119).

(12) And the foregoing findings and conclusions are embodied by express reference in the insular Supreme Court's judgment, which reads (R. 121; italics ours);

> "*For the reasons set forth in the foregoing opinion,* the petition herein is granted, and, therefore, the order made by the District Court of Ponce on March 24, 1943, is hereby vacated and another rendered instead ordering the ex-executor Mario Mercado Riera to proceed to deliver the estate left by Mario Mercado Montalvo to his heirs Maria Luisa, Adrian, Margarita and Mario Mercado Riera, in compliance with the compromise contract executed on September 9, 1938, and also to render to them supplementary accounts as from October 27, 1941, when the former accounts were rendered, until the time of such delivery, for all of which he is allowed a term of sixty days."

Those facts should, we think, explain fully why Porrata is here, asking this court to enforce his constitutional and federal statutory rights by telling the insular Supreme Court that it cannot pass judgment against a person who has not been accorded notice, hearing and due process. In this connection we respectfully ask this court to reexamine the Fourth Point in our Brief for Appellant Porrata, pages 31-34, and particularly the authorities there cited and quoted.

To the appellants here it will seem indeed a travesty on justice if these appellees are permitted to succeed in their long course of contentious, obstructive tactics and shifty double talk. Originally they contended vigorously that the

estate was under the law of special proceedings and judicial administration (*Porrata* v. *Court*, 53 P. R. R. 140; R. 856-863). Now they are contending just as strenuously that it is and always has been under the old Spanish law of the Civil Code. Although they brought Porrata into the case in the insular Supreme Court, there sought judgment against him, and still claim that he is bound by the judgment there, they insist on the other hand that he has no interest in the controversy. They alleged here that Porrata had been paid in order to support their contention that he has no litigable interest here, *and they did so with full knowledge that they had already challenged the legality of that payment.*

In its opinion of November 23, 1945, this court holds, in effect, that all that is said by the insular Supreme Court about Porrata is *obiter dictum*, but nevertheless affirms the judgment of that court expressly predicated upon reasoning that includes that same *obiter dictum*. As the lower court obviously thought it necessary to pass upon Porrata's status and rights, believed it had jurisdiction to do so, and did so, how can this court now properly presume that that court would have dictated the same opinion and judgment if it had thought it had no jurisdiction to pass upon Porrata's rights. Is it not more reasonable to suppose that that court, if it had understood and believed, as this court apparently now proposes to inform it, that it had no jurisdiction to pass upon Porrata's status and rights, would have remanded the case to the district court for the further procedure requisite to establish such jurisdiction before proceeding to interpret the law and the contract of compromise to which Porrata was a party, and to order the delivery of the estate on the basis of the conclusions reached.

For the reasons hereinabove indicated with relation to Porrata's appeal, we respectfully urge that that part of the opinion of this court pertaining thereto, also should be reconsidered, and that either the judgment below should be reversed outright or at least that the case should be re-

manded to the court below with instructions to send it back to the district court for further appropriate proceedings to determine after proper notice and hearing whether Porrata is a necessary party to this proceeding, and if so, to ascertain his related status, rights and duties. These are issues never properly tried out below, and which this court cannot properly undertake to adjudge upon the present record.

CONCLUSION.

The opinion of November 23, 1945, is clearly erroneous in vital particulars and a rehearing should be granted, whereupon the previous opinion and judgment of this court should be vacated and new ones entered reversing the judgments under appeal.

Respectfully submitted,

FRED W. LLEWELLYN,
PEDRO M. PORRATA,
Attorneys for Appellants.
336 Southern Building,
Washington, D. C.

December 20, 1945.

LEON, WEILL & MAHONY,
Of Counsel.

I, PEDRO M. PORRATA, of Ponce, Puerto Rico, now temporarily in the City of Washington, D. C., being one of the appellants and also one of the attorneys for the appellants in the above entitled case, hereby certify that the foregoing petition for rehearing is submitted in good faith and not for delay.

PEDRO M. PORRATA.

SUBJECT INDEX.

Page

I. Statement of Facts 2-8

A. Origin of Certiorari No. 1517 2-3

B. District Court's ruling 3

C. Respondents' petition for certiorari 4-6

D. Porrata's position before insular supreme court 6-7

E. Self-contradictory action of Court of Appeals 7

F. Conflict between courts below 7-8

II. Question presented by Porrata 8-9

III. Porrata's position here 9

IV. Argument

G. Respondents' involved arguments cannot obscure issue 9-10

H. It was respondents who put Porrata's rights at issue 11-14

I. Porrata sought hearing in district court; respondents objected 14-15

J. Respondents' charge that Porrata voluntarily intervened in insular supreme court untrue 15-18

K. Respondents tacitly admit they intend to use insular supreme court judgment against Porrata in future litigation 18-19

L. They are already attempting to do so in their pending appeal from the district court judgment on the final accounts of Executor Mercado 19-21

M. Points on which Porrata would have presented evidence and argument had he been allowed a hearing in the trial court 21-25

Summary 25-26

Page

Conclusion 27

Appendix 28-37

Extract from respondents' brief as appellants in final accounts case.

Spanish text 28-37

Translation 33-37

TABLE OF CASES.

Galpin v. Page, 18 Wall. 350 15
Holden v. Hardy, 169 U. S. 366 15
Nicot v. Valdecillo, 28 P. R. R. 524 11
Powell v. Alabama, 287 U. S. 45 14

STATUTES.

Federal

Constitution, 5th Amendment (due process clause) 7, 9, 10, 18
Organic Act for Puerto Rico, Sec. 2 (due process clause) 7, 9, 10, 18

Puerto Rican

Act No. 20, Laws of 1933, pp. 234-236 23
Civil Code, Sec. 1021 23
1044 ..... 22, 23
1206, 1230 23
Code of Civil Procedure, Sec. 335 (Rule 69, Supreme Ct. of P. R.) 6
Code of Civil Procedure, Secs. 588, 589, 592 19

OTHER AUTHORITIES.

Jurisprudencia Civil, 96 p. 599; 173 p. 699; 187 p. 807 13
Rule 69, Supreme Court of Puerto Rico (Sec. 335, Code of C. P.) 6

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 908.

MARIO MERCADO RIERA, EXECUTOR, *et al.*,
Petitioners,

v.

MARIA LUISA MERCADO RIERA DE BELAVAL,
et al., Respondents.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

PETITIONER PORRATA'S BRIEF IN REPLY TO RESPONDENTS' BRIEF IN OPPOSITION.

To emphasize the separate nature and importance of the federal constitutional question raised in this case by Petitioner Porrata, he respectfully asks leave to present this separate reply to respondent's brief in opposition.

I.

STATEMENT OF FACTS.

Respondents' brief in all consists of 116 pages. The supposed statement of facts, which is largely an amalgam of erroneous and misleading statements and argument, covers 36 pages. The part styled "argument", 50 more. A motion for dismissal, containing little but more argument, covers 24. However, the reasons why Porrata is petitioning this high court to grant certiorari to review this case remain plain and convincing, despite all attempts on the part of respondents to becloud the issues.

A.

This case started with a petition filed by respondents before the District Court of Ponce, alleging Porrata's rights and duties under the compromise contract; and the refusal of Judge Gadea to pass upon those rights and duties because of lack of notice and hearing.

This case originated in the Ponce District Court, wherein the Mario Mercado Montalvo estate was being administered judicially (See "Chronology," Pet. and Br., pp. v to xii). The petition originating the case, was filed by respondents (R. 348-359). It was obviously based on the contract of compromise of September 9, 1938, signed by Porrata, the executor and these respondents. Said petition plainly alleges Porrata's rights and duties under said contract of compromise (R. 350 and 354-355).

Was Porrata served with a copy of respondents' petition for delivery filed before the district court? He was not. What happened then? It happened thus: Judge Gadea of the District Court of Ponce, naturally, refused to pass upon those rights and duties of Porrata alleged by respondents in the petition, because Porrata had first to be accorded his constitutional and even human right to notice and hearing, and furthermore, because when Porrata, desiring to save time, filed a motion to be heard in the proceedings on No-

vember 26, 1941 (R. 385-395), respondents objected to the granting of the hearing applied for by Porrata (R. 81-82).

B.

Let us quote the exact words with which the district court passed upon the anomalous situation thus presented, as follows (R. 475).

"It has been argued by the co-heirs don Adrian and doña Maria Luisa in their brief, and orally, that aforesaid partition should have no effect whatsoever, as it was prepared and submitted after the date upon which it was supposed to have been delivered under the provisions of the contract of compromise heretofore mentioned.

We believe that no order should be entered with respect to the partitioner's report because, first, the motion with respect to the quashing of the notice of the partitioner's report heretofore set forth has not been set down for hearing and has not been argued, and second, because in order to order either one or the other, as the parties may request, *it is necessary, first, to consider whether the partitioner had any just cause for rendering his report to the co-heirs on the date upon which he did so,* and for that it is necessary that the partitioner and the objecting co-heirs put the court in a position *where it could decide this matter of fact. Both in this action as well as Number 1213, acceptance with benefit of inventory, etc., the Honorable Judge Sepulveda reserved the partitioner his right to allege whatever he deem convenient 'in accordance with his duties and office'.*" (Italics supplied)

It is manifest from these words of Judge Gadea that respondents were doing something very unconventional in law and equity, i. e. *asking a court to pass upon the rights and duties of a person, while actively objecting to the granting of notice and hearing of the very same person whose rights were to be adjudicated.*

C.

Having failed in their attempt to secure action without notice and hearing against Porrata in the district court, respondents used the irregular and improper proceedings in certiorari to secure same in the supreme court.

Faced with the conclusion of the District Court of Ponce, the court of original jurisdiction, that Porrata's rights and duties could not be passed upon without notice and hearing, respondents proceeded to apply for a writ of certiorari before the Supreme Court of Puerto Rico, again alleging in their petition, Porrata's rights and duties (R. 40-58).

In subdivision 6 of the petition (R. 41), respondents allege:

> "*The testator appointed as commissioner of partition of the estate, simply and without specifying any term, Pedro M. Porrata.* The latter secured from the lower court a certificate evidencing his appointment in civil proceedings No. 802, dated September 6, 1937. Before a year had elapsed after having qualified, August 19, 1938, he was granted, on motion in that same proceedings, a judicial extension of his appointment for a further year, which expired in September, 1939, contemporaneously with the office of Mario Mercado Riera, *then testamentary executor, without having sought or obtained in any way any further extension as such commissioner of partition.*" (Italics supplied.)

In subdivision 10, letters (l) and (m) they quoted the corresponding paragraphs of the contract, themselves supplying the italics, as follows (R. 46):

> "(l) Don Pedro M. Porrata, who witnesses this act in his capacity as testamentary commissioner of partition of the estate left by don Mario Mercado Montalvo, *bearing in mind that the heirs don Mario, doña Margarita, doña María Luisa and don Adrián Mercado Riera, are in agreement regarding the manner and terms of the partition or distribution of the estate left by the ancestor, don Mario Mercado Montalvo, and in regard to everything in connection thereof (as evidenced by*

the present compromise contract), accepts said contract as if he were a party thereto in all its stipulations, terms and conditions, and so far as the same affects him as commissioner of partition of the said estate, and undertakes to abide thereby in conformity with the literal text of the present contract, without modification, addition or alteration whatever in the draft of partition of the hereditary estate referred to in the following subdivision".

"(m) The deed of partition of the estate left at his death by don Mario Mercado Montalvo shall be executed by the said commissioner of partition and the aforesaid four universal heirs. Said don Pedro M. Porrata, who witnesses this act, *undertakes to perfect the said draft of partition within ten days from the payment of the inheritance tax in the present case and exclusively in accordance with the terms of this contract, which shall not be enlarged except as regards the description of the hereditary estates or properties, nor modified, or added to, or altered in any way; . . .*"

In subdivision 12 (R. 48), they alleged:

"As appears from the compromise contract recited in paragraph 10, supra, the heirs of don Mario Mercado Montalvo accepted the inheritance on or prior to September 9, 1938, and on that date and by said compromise contract, expressly agreed upon the undivided allotment of the hereditary estate (ante, page 44), with the consent and acceptance of the then commissioner of partition, Pedro M. Porrata (ante page 46), as well as with the consent and acceptance of Mario Mercado Riera, who, at that time, acted also in his capacity as simple executor."

In subdivision 20, paragraph (E2), the petition alleges (R. 54):

"2. Because the legatees themselves in the present case were estopped from making such allegations by virtue of the testamentary prohibition transcribed in paragraph 4 of this certiorari petition (page 41);"

The writ was issued upon respondents' petition, and respondents proceeded to notify both petition and writ to Porrata (R. 61-62). In serving this notice, respondents were unquestionably guided by Rule 69 of the Supreme Court of Puerto Rico (335 Code of Civil Procedure, 1933 Ed.) which requires petitioners in certiorari to notify all parties interested in the proceedings below.

D.

Porrata alleged before the Supreme Court of Puerto Rico that said court lacked jurisdiction to pass upon his rights and duties as there was no notice and hearing before the District Court of Ponce where the case originated and because there was no jurisdictional error giving rise to the extraordinary remedy of certiorari.

Upon his receipt of the notification of the petition and writ served by respondents, Porrata filed in the insular supreme court, May 24, 1943, his *Special Appearance for the Purpose of Raising a Constitutional Question* (R. 67-96), alleging that respondents were seeking to have the supreme court pass upon questions affecting him, concerning his duties and functions and rights, without notice and hearing before the District Court of Ponce. Porrata's "Special Appearance" was accompanied by a copy of the "*Special Appearance Requesting that the Service or Notice of a Purported Report of the Testamentary Partitioner* (Porrata) *be quashed*" (R. 81-82) filed by attorneys for respondents to prevent Porrata being heard before the District Court of Ponce upon the issues raised by their own petition for delivery. Porrata further alleged (R. 95) that there was no procedural or jurisdictional error to give rise to the certiorari proceedings; that the court had no jurisdiction to pass upon his rights and duties (R. 67-69); that he was not notified or heard before the court of original jurisdiction (R. 91-92); and that the case should be remanded for further action according to the opinion of the district court; but Porrata was overruled by the insular

supreme court in its opinion and judgment (R. 100, 103, 104, 114-115).

See original petition and brief, pages 47-50, where quotations are made from the supreme court opinion to show how decisively that court passed upon Porrata's rights and duties without notice and hearing.

E.

The Circuit Court of Appeals, aware of the erroneous action of the Supreme Court of Puerto Rico, coincides with the position assumed by the District Court of Ponce, but by failing to reverse, sanctions the infringement of Porrata's constitutional rights; and thereby creates a constitutional question requiring examination by this court.

The Circuit Court of Appeals substantially agrees with the opinion of the Ponce District Court, and disagrees with the insular supreme court, but instead of reversing the judgment, waives the fundamental question of notice and hearing and allows the judgment of the insular supreme court, rendered in violation of the Constitution, to stand, instead of adopting the logical position taken by the District Court of Ponce, which court refused to render judgment in the case until a hearing was accorded to Porrata.

F.

The facts of this case clearly reveal a conflict in the courts below and even a plain confusion in a matter concerning the fundamental rights of people, requiring examination by this court.

The facts summarized above, are the facts of this case, regarding the special constitutional question raised by Porrata.

With those facts before it, this court can hardly be misled by respondents' frantic efforts to avoid a review here upon the technical ground that no federal question is in-

volved. The pursuit of such strategy has now become chronic among Puerto Rican litigants with unsound cases, seeking to defeat the rights of appellate review authorized by Congress. In the present case, among the several federal questions involved, this one of deprivation of property and rights without notice or hearing is especially outstanding in clarity and force. As shown by the record, and above noted, its presence in the case was definitely pointed out by the district court in the very opinion and order reviewed by the insular supreme court on certiorari, and was again repeatedly brought to the attention of the insular supreme court by Porrata in the course of that review. It was entertained by the Court of Appeals, and was evaded there by recourse to an erroneous interpretation of the judgment of the insular supreme court, manifestly contrary to its intent and purpose, as not binding or affecting Porrata. The question is still here in the case, unanswered, and demanding settlement by this tribunal, the final arbiter of American justice.

II.

QUESTION PRESENTED BY PORRATA.

Could respondents, María Luisa and Adrián Mercado Riera, file in the testamentary proceeding in this case, a petition under a contract (the contract of compromise of September 9, 1938) to which they were co-signors with partitioner Porrata; allege in said petition Porrata's rights and duties and a violation of those duties under the contract involved; when Porrata tried to intervene and be heard, object to the hearing asked for; while so objecting, petition the court for a judgment against Porrata (*supra* p. 2); when the district court refused to render the judgment petitioned for by respondents (*supra*, p. 3), go to the Supreme Court of Puerto Rico asking for review by certiorari and petitioning that supreme court to render judgment against Porrata without allowing Porrata the right to introduce pleadings and evidence as required by

the universal principle of humanity and justice known as due process, before the only tribunal with power to receive such pleadings and evidence under Puerto Rican Law (which in this case was the District Court of Ponce); and upon such procedure lawfully be awarded the judgment against Porrata thus sought for and obtained in the insular supreme court?

III.

PORRATA'S POSITION.

Petitioner Porrata contends:

That the opinion of the Circuit Court of Appeals and the conclusions reached therein required a reversal of the judgment of the Supreme Court of Puerto Rico; that the proceedings before the insular supreme court were so contrary to justice and right that they cannot be affirmed without deprivation of the constitutional rights of Porrata; and that justice calls upon this tribunal now to exercise its power of supervision and adjudicate the real issue involved herein, *as to whether the rights of a person can be passed upon in a jurisdiction under our flag without notice and hearing.*

IV.

ARGUMENT.

G.

The lengthy and involved arguments in respondents' brief cannot obscure the fundamental issue of lack of notice and hearing.

Answering in bulk all the turmoil of inapposite, unsound and confusing arguments presented by respondents, we repeat substantially what Porrata said in his "Special Appearance for the Purpose of Raising a Constitutional Question" (R. 67-69), and in his answer to the petition for certiorari before the Puerto Rico Supreme Court (R 83, where the special appearance is reproduced; R. 90-92, where the lack of notice and hearing is reasserted; R. 95, where Por-

rata prayed for the remanding of the case in order that he might be heard upon the questions raised over the execution of the deed of partition), when we say again here that there is one paramount question to be decided by this court at the start—*whether the rights and duties of Porrata could be adjudicated by the Supreme Court of Puerto Rico without notice and hearing before the District Court of Ponce, the court of original jurisdiction.*

The Puerto Rican Supreme Court patently erred in not recognizing *Porrata's right to notice and hearing before the District Court of Ponce.* For if there was no notice and hearing, how could the Supreme Court of Puerto Rico render any judgment in the case passing upon Porrata's contractual rights and duties, or take any action constitutionally valid against Porrata? The District Court of Ponce, the court of original jurisdiction, thought that Porrata had to be heard before any judgment could be rendered.

Was the insular supreme court entitled to reverse the district court? It was not. Its opinion and judgment passing upon Porrata's rights and duties is patently erroneous in every respect, and should not be allowed to stand, as it was deliberately procured by respondents in violation of Porrata's constitutional rights.

It certainly would be something new under the law, if we were not entitled to maintain that the opinion of the Ponce District Court follows the Organic Act and the Constitution, when that court refuses to charge Porrata with the violation of a contract without according him a hearing, and that the insular supreme court action affecting Porrata's rights, under the circumstances shown, constitutes an obvious infringement of constitutional law.

H.

Respondents, who put Porrata's rights and duties in issue in this case and procured adjudication thereof without notice and hearing, are now attempting to evade responsibility for so doing by falsely alleging that it was the executor who first put those rights and duties in issue.

Respondents deviously now contend that it was the executor who first brought Porrata's duties before the court (Resp. Br. in Opp., p. 47). That contention is not only immaterial but also flagrantly incorrect. *It was respondents themselves who deliberately alleged those rights and duties in their petition for the delivery to them of their shares of the estate* (R. 354-355). By alleging Porrata's duties and rights, and charging derelictions against him, they naturally forced an answer, and cannot deny now having themselves introduced the resulting issues. However, they could not do otherwise, as the petition last mentioned was based expressly on the contract of compromise, signed by Porrata and the heirs (R. 348-359).

Out of ten pages covered by the said petition, over 6 pages are occupied with quotations from the compromise contract; all of said quotations affecting profoundly, directly or indirectly, Porrata's rights and duties. Moreover: That petition for delivery was, more than anything else, a petition for the interpretation of the contract of compromise, to which contract Porrata was the paramount party, especially in relation to the matter in issue before the court, and as anything said or done by the interpreting court necessarily would bear on the co-signors, Porrata was logically considered an indispensable party.

Attention is invited to the case of *Nicot* v. *Valdecilla* et al. 28 P. R. R. 524, at page 527, where, in an action for specific performance of a contract, it is held that all the co-signors are necessary parties. In that case, which is not nearly so strong as ours in this respect, no interest was shown in the defendant Rivera, but, nevertheless, as Rivera was a co-

signor with Valdecilla and the plaintiff, he was adjudged to be a necessary party. In our case, Porrata's rights and duties are specifically alleged by respondents themselves, together with an allegation that he failed to perform his duties, and, therefore, his presence in the proceedings was absolutely indispensable. Such was the understanding of both the district court and the Supreme Court of Puerto Rico; the only difference between them in that respect being that the district court required notice and hearing, while the insular supreme court ignored its absence.

In other words: respondents who, as indicated above, alleged Porrata's rights and duties in their petition, undertake now to argue that Porrata was not a necessary party to the proceedings, contrary to the obvious understanding of both local courts, and to respondents' own original theory of the case. That, in any event, is immaterial now, because there is a judgment against Porrata; but let us examine this question further.

Respondents' own petition for the delivery of their shares of the estate, we repeat, *specifically alleges Porrata's rights and duties* (R. 354-355). The District Court of Ponce, which court had been dealing with the estate from the start, held that it could do nothing about Porrata's rights and duties without hearing Porrata (R. 474-475). The petition for certiorari filed by respondents in the Supreme Court of Puerto Rico, alleges Porrata's rights and duties (*supra*, pp. 4-5); and respondents in their brief before the Supreme Court of Puerto Rico insisted and prayed for a judgment against Porrata. Let us see what respondents said in that brief:

> "A particular of importance to be taken into consideration is that the so-called partitioner's deed whose previous perfection was alleged as a prerequisite for the delivery of the estate to the interested parties, was not prepared within the time nor subject to the compromise contract, and it was only projected after the office of commissioner was allowed to expire.
>
> The executorship expired by course of law in September 1939. (Point 1) The functions of the partitioner

expired also on that date, accepting *arguendi gratia* that they did not expire by virtue of the adjudication of the estate by and between the interested parties in September, 1938, as already shown. The terms of the partitioner, as that of the executor, are subject to the same provisions. 96 Jurisprudencia Civil, pags. 599, 601-602; Sents. de febrero 24, 1927 y febrero 22, 1929 173 J. C. 699 y 187 J. C. 807).

Mr. Porrata agreed to prepare the said partitioner's deed ten days after the payment of the inheritance tax. This payment was made extemporaneously on February 29, 1940, (Ex. 8). [Ours: misleading because it was really made on the date of the Treasury receipt, March 9, 1940, and respondents knew the reasons why]

Assuming personality and capacity as partitioner in Mr. Porrata in February 29, 1940, he should have prepared the deed ten days after, on or before March 10. He came to execute it on March 14. [Ours: Deliberately misleading because the deed was prepared even before March 9, 1940, as shown by the record. The meeting could not be had March 9, as indicated herein, only because of respondents' own solicitation. What happened on March 14th was that the partitioner advanced the copy at the solicitation of respondents' attorneys.] And the text of the deed conflicted with the literal text of the compromise contract that the partitioner accepted not to alter except in regard to the description of the real estates or inheritance . . . Respondents' Brief before the Supreme Court of Puerto Rico, pages 85-86.) (*Translation and comments in brackets ours.*)

Moreover: The Supreme Court of Puerto Rico, to be able to decide for respondents, found it necessary to declare that there was no judicial administration, that Porrata had forsaken his rights and failed in his duties under the contract, and that his term for the execution of the deed of partition had expired (R. 100, 103, 104; 114-115; 116; 119; 121); thereby obviously deciding that Porrata was an indispensable party. Of course he was so, for the contract of compromise was also his, and could not be interpreted without him.

Therefore, Porrata was a party entitled to be heard in the trial court for more than one reason plainly appearing from the record and the decisions of Puerto Rican courts. He was brought into the picture by these respondents; his rights were put in issue by specific allegations of respondents themselves.

I.

Respondents' brief in opposition seeks to induce this court to err by deliberately ignoring the fact that Porrata tried to intervene and present evidence in his favor before the district court, to which respondents objected.

Respondents allege that Porrata did not try to intervene in the proceedings before the District Court of Ponce (Resp. Br. in Opp., pp. 14-15. They ignore the fact that Porrata was there and did try to intervene, though respondents did not join him as a party to their motion for delivery (R. 385-395; alleging that proceeding No. 782, wherein they were seeking to have Porrata's rights and duties adjudicated behind his back, was already terminated. The legal position thereby taken by respondents, objecting to Porrata coming into the proceedings while asking for adjudication against him, is almost incomprehensible; *for it requires a full stretch of the imagination to find any justification for their attempt to procure the adjudication of a person's rights and duties in a proceeding, in this case 782 of the District Court of Ponce, while the proponents themselves, respondents herein, were not only withholding notice, but objecting to the granting of hearing to the very same person, Porrata, to be adversely affected by the judgment sought.*

This United States Supreme Court said in *Powell* v. *Alabama*, 287 U. S. 45, about the right to notice and hearing (p. 68):

> "It never has been doubted by this court, or any other so far as we know, *that notice and hearing are preliminary steps essential to the passing of an enforceable*

judgment, and that they, together with a legally competent tribunal having jurisdiction of the case, constitute basic elements of the constitutional requirement of due process of law. The words of Webster, so often quoted, that by 'the law of the land' is intended *'law which hears before it condemns,'* have been repeated in varying forms of expression in a multitude of decisions. In *Holden* v. *Hardy,* 169 U. S. 366, 389, the necessity of due notice and an opportunity of being heard is described as among the *'immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard.'* And Mr. Justice Field, in an earlier case, *Galpin* v. *Page,* 18 Wall, 350, 368-369, said that the rule that no one shall be personally bound until he has had his day in court was as old as the law, and it meant that he must be cited to appear and afforded an opportunity to be heard. 'Judgment without such citation and opportunity wants all the attributes of a judicial determination; *it is judicial usurpation and oppression, and never can be upheld where justice is justly administered'.* Citations to the same effect might be indefinitely multiplied, but there is no occasion for doing so." (Italics, except in citations, supplied.)

J.

The intention of respondents to induce this court to err appears still more manifest when they deliberately ignore in their brief the fact that they not only alleged Porrata's rights and duties in their certiorari petition, but also served Porrata therewith, recognizing his interest in the controversy and giving rise to the constitutional question.

Respondents on page 20 of their brief in opposition again attempt to lead this court into error by charging that Porrata voluntarily intervened in certiorari 1517. They even cite the record in support of that unfounded and deliberately misleading statement. Let us state the facts: Porrata was brought into the picture by respondents' petition quoting the contract of compromise provisions relating to

Porrata's rights and duties, alleging failure on his part to discharge those duties, and by service of process on Porrata. What the record shows is this: Respondents on March 7, 1943, served Porrata with papers headed and purporting to be Certiorari 1517. So respondents stated in the return filed with the Secretary of the insular supreme court, under rule 69 of that court, that they had notified Porrata of Certiorari 1517. However, Porrata discovered that the copy of the petition served upon him with the writ of certiorari in No. 1517 was not a copy of the petition in that case at all, but was a copy of a petition in certiorari No. 1518. Porrata called attorney Poventud's office and informed him that respondents had notified the Supreme Court of having served him Certiorari 1517, when actually the heading of the papers served was 1517, but the papers corresponded to 1518. Respondents immediately served the papers corresponding to the heading of 1517. The return clearly bears us out. It reads (R. 61-62):

"Civil No. 1517.

RETURN OF SERVICE OF NOTICE.

(Filed in the Supreme Court of Puerto Rico April 24, 1943)

"Heriberto Febus Quintero, [Attorney Poventud's Secretary] under oath, deposes:

"That he is of lawful age, that he has no interest in nor is a party to the above entitled cause; that on April 7, 1943, Pedro M. Porrata, Esq., acknowledged notice of the petition in the above entitled cause [civil action 1517, as indicated by the title], said acknowledgment of notice together with others, were filed in the Supreme Court on April 19, 1943; [clearly by the 19th of April the supreme court was already informed that Porrata had been served with certiorari 1517], that yesterday, Thursday, April 21 [two days after the Supreme Court was misinformed], Pedro M. Porrata, Esq. advised the undersigned by telephone, as Secretary to José A. Poventud, Esq. who is ill, that the petition which he received on April 7th, referred to cer-

tiorari No. 1518 [that is, called their attention to their error], *re* nullity of notice for delivery of properties, sale, etc. and not to certiorari No. 1517, re: delivery of hereditary properties [which respondents informed the court they delivered to Porrata on April 7], etc.; *that through instructions given by José A. Poventud, Esq., as attorney for the petitioners Adrian and María Luisa Mercado Riera,* I delivered, on this day April 22, 1943 [so Poventud wanted to leave no doubt that he intended to serve 1517 on Porrata], to Pedro M. Porrata personally and at his offices located on Concordia Street, corner of Luna, in Ponce, P. R., it being about 10:30 A.M., copies of the petition and order with respect to the certiorari record in the above entitled cause, with respect to delivery of hereditary properties; and the undersigned sets forth that Pedro M. Porrata, received the copies of the petition and order in certiorari No. 1518 (nullity of notice for withdrawal of funds in deposit, sale of properties, etc.), which he states were delivered to him by the undersigned on April 7, 1943.

H. Febus, *Declarant.*

Ponce, P. R., April 22, 1943." (Comments in brackets, and italics, supplied.)

Porrata, therefore, came into the proceedings before the Supreme Court of Puerto Rico because respondents put in issue his rights and duties in their petition for certiorari, regarded him as a party, and served the certiorari petition on him. And respondents' attorneys knew that in the Supreme Court of Puerto Rico no evidence could be introduced by Porrata. They cannot complain, therefore, of Porrata's raising the constitutional question in that supreme court and contending there that the case ought to be remanded *for lack of notice and hearing before the proper court,* in accordance with the district court's opinion. Porrata raised that constitutional question, not only in his special appearance, but more specifically in the answer (R. 67-69, R. 83 top; R. 90-92; R. 95, where Porrata expressly prayed for the remanding of the proceeding for a hearing on the partitioner's report).

Thus it is clear that the constitutional question was raised, reserved, and all the way carried through in both insular courts, to the end in the special appearance and answer. That question is privileged and fundamental. The purpose of the Organic Act and the Constitution cannot be defeated or ignored on shallow pretexts, nor can any pretexts be considered valid here where Porrata was and is being affected by a judgment clearly rendered without notice and hearing in the only court endowed under Puerto Rican law with original jurisdiction to receive evidence and assure to the parties the full and fair hearing required by due process.

K.

Respondents in their brief, are clearly informing this court that they are prepared to use the judgment in issue rendered without notice and hearing, in future litigation against Porrata, although Porrata was not allowed to participate or introduce evidence in his defense.

On page 52 of respondents' brief in opposition we find the following argument:

> "The foregoing plainly shows that appellant *Porrata's sole interest, as an intervenor in No. 1517, is in the effect of the decision* therein as a precedent in possible future litigation among the co-heirs, *concerning the new final supplemental accounts from March 5, 1940 to August 31, 1943.*"

If the words of a litigant used in order to induce action by a tribunal are to be given any meaning at all, those last above quoted from respondents' brief, should induce this court to grant this writ of certiorari and examine respondents attempt to use the judiciary to suppress and deny the rights of the individual. Here we are faced with a judgment of the Supreme Court of Puerto Rico obtained against Porrata without notice and hearing by the deliberate action of respondents, and in the quotation above set above, we

are implicitly informed of the intention of respondents to use that judgment to Porrata's injury. Thus, in effect, they admit deliberate design in their effort, successful thus far, to prevent Porrata from introducing in the record of this case his evidence to the effect that he fully fulfilled and complied with his obligations under the compromise contract.

It should be kept in mind that the constitutional question raised by Porrata represents a complaint against the appellate courts below going ahead and making a case to his injury on pleadings alleging, and unilateral evidence tending to prove, Porrata's infraction of a contract, and against their undertaking to interpret and apply the provisions of the contract, without allowing Porrata the corresponding right to answer the imputations against him. Respondents did not object before the insular supreme court to the constitutional question there raised by Porrata in his special appearance. The issue was provoked by respondents from the beginning; it is there in the case, a vital and decisive issue of constitutional law, decided in Porrata's favor by the District Court of Ponce, against Porrata by the Supreme Court of Pureto Rico, and evaded by the Circuit Court of Appeals.

L.

IMPORTANT.

To demonstrate still further the justice of granting this petition for a writ of certiorari, we invite the attention of this court to the fact that respondents are already attempting to use the judgment of the insular supreme court in this case as constituting res-adjudicata against Porrata. Let us explain.

Judge Sepulveda, in his judgment upon the settlement of the original accounts in district court No. 782, declared (R. 425-26):

> "For the reasons set forth above, in addition to articles 588, 589, and 592 of the Code of Civil Procedure (1933 Ed.) the court is of the opinion that a final order

should be entered modifying the final accounts of the executor in conformity with the decisions contained in the present statement of the case and opinion; providing that, according to law and justice, the surplus resulting from said modification of the final accounts, in cash or in real properties, be divided among the persons entitled to it, to wit, the four co-heirs of testator Mario Mercado Montalvo, whose names are Mario Mercado Riera, Margarita Mercado Riera, Adrián Mercado Riera and María Luisa Mercado Riera, after payment of the debts of the decedent and the expenses of administration; all without any special taxation of costs, that is, that each one of the litigating parties pay their own cost and the fees of their respective attorneys."

On appeal before the Supreme Court of Puerto Rico, on another incident, respondents are now challenging this part of Judge Sepulveda's judgment, and alleging that in the case now before this court, the Supreme Court of Puerto Rico declared the partition already completed and, therefore, Porrata ousted; and respondents are citing in support of that contention the following excerpt from the insular Supreme Court's opinion in this case (R. 119; italics ours):

"If the heirs in the case at bar had already accepted the inheritance and agreed upon its distribution, pursuant to the compromise contract of September 9, 1938, the fact that the executor *and the commissioner of partition had failed to perform* its terms should not be ground for claiming, several years afterwards, that the heirs are not in agreement as to the way in which they should distribute the estate among themselves. Nor should the appeal pending regarding the order made by Judge Sepulveda approving the final accounts submitted by the executor be ground either, for, apparently, according to said contract (Subdivision (g)), such accounts covered only 'the fruits, rents and products, or any other accretions of the estate . . . and any balance resulting therefrom shall be distributed among the aforesaid four heirs of the ancestor, share and

share alike'. We say 'apparently', because as admitted by the petitioners in their brief, 'The concern for clearing up this particular constitutes, among others, one of the grounds of said appeal'."

Thus respondents are now insisting before the Supreme Court of Puerto Rico in another proceeding, that the judgment of that court in this case means the ousting of Porrata as partitioner and that the estate is already distributed among the heirs, because of Porrata's failure to do so.

In the appendix to this brief (*infra*, pp ——), we are inserting the Spanish text of respondents' argument in their brief in the new incident above mentioned, filed with the Secretary of the Supreme Court of Puerto Rico in June, 1944, together with an English translation thereof, to furnish additional proof that the writ now sought by Mercado and Porrata should be issued, and that the appellate court judgments below should be reversed for violation of the due process clause.

In other words: the contract of compromise contains general rules of partition, but it does not constitute the partition itself. Judge Sepulveda and Judge Gadea of the District Court of Ponce, and the Court of Appeals, all agree to that. To interpret that contract validly in detriment of Porrata's right to partition the estate, Porrata must first be heard. As he was not heard, the insular supreme court judgment is void. In not so declaring lies the error of the Court of Appeals, justifying the granting of this writ and, in due course, the reversal of the judgment of that court.

M.

Examples of points upon which Porrata would have been able to present evidence and argument had he been allowed notice and hearing before the proper court.

The Supreme Court of Puerto Rico, in its opinion upon a record devoid of Porrata's evidence, accepts respondents' allegations, and finds that Porrata violated the contract

of compromise, but if Porrata had been accorded his right to participate and introduce evidence before the District Court of Ponce, he would have proven (challenging respondents' devious contention that Porrata did not prepare the proposed partition within the time provided in the contract), that the inheritance tax was actually paid on March 9, 1940, the date of the official receipt (R. 583-588); that even before March 9, Porrata prepared the partition deed and visited the respondents' attorneys; that he received a telegram from Celestino Iriarte, one of those attorneys, asking for the postponement of the meeting for reason of an injury received while riding on horse back, and that there was no objection to that postponement to March 16, 1940 (R. 770-771 and 603), a date still within the limit set in the contract. He would have been able also to show that he kept on insisting on compliance and complying at all times with his duties under the contract, which, under Section 1044 of the Puerto Rico Civil Code, is the paramount and fundamental law between the contracting parties.

As shown by the contract of compromise (R. 543-545) Porrata and the four heirs contracted that "the partitioner's report on the estate . . . shall be executed by aforesaid partitioner and aforesaid four universal heirs" and Pedro M. Porrata undertook "to have said partitioner's report prepared within a term of ten days from the payment of the inheritance tax in this case and in accordance with the provisions of the contract".

We find, therefore, Porrata contracting with the Mercado heirs, under Puerto Rican law, for the preparation of a document to be executed by him and four other persons.

Now, what is the nature and effect of a contract in Puerto Rico, and for that matter, we believe everywhere in the world? A contract in Puerto Rico has the nature and effect of private legislation between the contracting parties, who are bound by it as by the strictest and severest rule of public law that might be enacted. Such is the conclusive intent and effect of the following sections of the Civil Code.

Section 1044, Civil Code of P. R., 1930 Ed.

> "Obligations arising from contracts have legal force between the contracting parties, and must be fulfilled in accordance with their stipulations."

Section 1206, ib.

> "A contract exists from the moment one or more persons consent to bind himself or themselves, with regard to another or others, to give something or to render some service."

Section 1230, ib.

> "Contracts shall be binding, whatever may be the form in which they may have been executed, provided the essential conditions required for their validity exist."

But it may be of some interest in passing to consider and have in mind, that the contract between Porrata and the Mercado heirs for the preparation of the deed of partition for the delivery of the estate within the term of ten days from the payment of the inheritance tax, was not conceived out of the caprice of the parties, but to fit precisely within the requirement of local inheritance tax laws.

Section 1021 of the Civil Code, 1930 Edition, provides that the partition legally made, confers upon the heirs the ownership of the estate awarded to them. It reads as follows:

> "*Section 1021.* A division legally made confers upon each heir the exclusive ownership of the property which may have been awarded to him."

But no partition can be considered as legally made until the inheritance tax is paid, according to the following provisions of the Puerto Rico Laws (Sec. 12, Act of Aug. 29, 1925, as amended by Sec. 5, Act No. 20, Laws of 1933, p. 234):

> "Except in such special cases as are determined in section 5a of this Act, no court shall approve the partition or distribution of the estate of any decedent or

> allow any final settlement of the accounts of any executor, administrator, trustee or person administering any estate, unless the special receipt or receipts as provided in section 11 of this Act, have been produced and exhibited; and no notary shall issue, authorize or certify any instrument of award, partition, distribution, alienation or hypothecation of property unless such receipt or receipts issued by the Treasurer are presented;" . . .

It is obvious, therefore, that the contract was framed as it was, with relation to the time for preparation of the partition deed, because of express statutory requirements rendering an earlier settlement and distribution of the estate unlawful, giving the contract the double legal status of law between the parties arising from statutory law.

Since there was law created by the parties consisting of their contract to govern their relations, the insular supreme court was bound to rest upon that law in so far as any of the parties to the compromise contract were concerned. Instead, that court digressed into interpretation of inapplicable statutes to determine that the term of office of Pedro M. Porrata for the preparation of the deed of partition was not ten days from the payment of the inheritance tax, but a term equal to that of a non-judicial executor. The court disregarded the paramount and vital facts that there was a contract binding upon the four heirs and Porrata, and that the duties assumed by Pedro M. Porrata under the contract of compromise were not merely those of a civil law partitioner, but were contractual duties to be examined, interpreted and adjudicated according to the contract.

More than that: The history of this litigation itself shows that everything depends on the contract:

1. The motion of these respondents for the delivery to them of their shares of the estate (R. 350; 354-355) specifically alleges the contract and Porrata's rights and duties under the same. Over half of the paper used is

dedicated to the insertion of portions of the compromise contract (R. 348-359). Out of 10 pages, almost 7 are used for that purpose.

2. The denial by the District Court of Ponce of the motion last mentioned was by no means absolute and has been misinterpreted in that regard by these respondents and the appellate courts below. It was the necessity of giving a hearing to Porrata, with relation to his compliance with the terms of the compromise contract, and the necessity of passing upon the deed of partition, that constrained the district court upon the questions in issue (R. 474-475).

3. The petition in certiorari filed to review the order of the district court, specifically alleges the contract of compromise, and specifically alleges the rights and duties of Porrata under it.

4. Even the opinion of the insular supreme court proceeds largely upon considerations of the contract, although it turns finally upon inapplicable statutes.

SUMMARY.

We perceive no useful purpose to be served by elaboration of this reply brief, to set forth the obvious refutations of many of the arguments and asseverations, some immaterial, some unfair, some substantially incorrect in manifest particulars, contained in respondents' brief. The essential facts and considerations may be summarized briefly as follows:

(1) In the District Court of Ponce, a petition was filed by these respondents within the testamentary proceedings of an estate which obviously was being administered judicially, seeking an order requiring immediate delivery to them of their respective shares of the estate, without the official partition required by the contract below mentioned.

(2) The petition alleged a contract, called the "Compromise Contract", signed by Porrata and the four Mer-

cado heirs, two of them respondents herein, providing that all join in the execution of a partition deed to be prepared by Porrata pursuant to the contract and for a fee prescribed thereby. The contract was the basis of the entire petition, and those parts affecting Porrata directly or indirectly were quoted at length, together with allegations that Porrata had failed to perform his duties thereunder, but Porrata was not notified.

(3) When Porrata thereupon asked to be heard and to be given opportunity to prove that he had complied with the contract, his petition to be heard was met by an objection of the respondents based on unsound technicalities, while at the same time they, the respondents, were asking the Ponce District Court to pass upon Porrata's rights and duties.

(4) When the Ponce District Court refused to do so, and decided that Porrata had to be heard, respondents applied for a writ of certiorari before the Puerto Rico Supreme Court, again alleging in their petition Porrata's rights and duties under the contract, and served Porrata with copy of the petition and of the writ issued thereon. Porrata immediately challenged the jurisdiction of the insular supreme court to pass upon his rights and duties without notice and hearing before the court of original jurisdiction; but his contention was denied, the insular supreme court giving no reasons for that denial.

(5) Porrata appealed. The Circuit Court of Appeals affirmed the judgment of the insular supreme court, although obviously disapproving the findings and conclusions of that court, set forth in its opinion and embodied in its judgment by reference, in regard to Porrata. Now we are here before this court, asking review and not only a disapproval, but also for a complete reversal, giving validity to the principle that in no way can the rights and obligations of a person be adjudicated under our law without notice and hearing.

CONCLUSION.

WHEREFORE, Petitioner Porrata prays this Court to grant the writ of certiorari applied for in this case.

Respectfully submitted,

PEDRO M. PORRATA,

FRED W. LLEWELLYN,
Attorneys for Petitioners.

LEON, WEILL & MAHONY,
Of Counsel.

APPENDIX.

Extract from brief filed by Respondents as appellants in the Supreme Court of Puerto Rico upon appeal from District Court judgment on final accounts of executor in this same testamentary proceeding.

(Spanish Text)

LA CORTE A QUO TAMBIEN ERRO AL DISPONER LA ADJUDICACION DEL SOBRANTE QUE RESULTARE EN "FINCAS," SIENDO ASI QUE DICHO PROUNUCIAMIENTO DEBIO HABERSE LIMITADO JURISDICCIONALMENTE A LOS FONDOS COMPRENDIDOS O DEBIDOS INCLUIR EN LA CUENTA FINAL, A TRAVES DEL PACTO ENTRE LOS HEREDEROS

Luego de haber resuelto las diferentes impugnaciones a la cuenta final del ex-albacea, la corte inferior dispuso por resolución con carácter de auto definitivo, que se adjudicase entre las personas con derecho a ello, el sobrante que resultare "en fincas," inadvirtiendo que no había cuestión alguna sobre "fincas" o inmuebles y que el pacto transaccional entre los herederos, excluía todo issue que pudiera versar sobre distribución de bienes raíces.

La parte pertinente de la resolución querellada, cuya modificación aclaratoria se interesa, dice como sigue:

> "Por todo lo anteriormente expuesto y vistos, además los artículos 588, 589, 590 y 592 del Código de Enjuiciamiento Civil (ed. 1933) la Corte es de opinión, que debe dictarse una Resolución con el carácter de AUTO DEFINITIVO, haciendo en la Cuenta Final del Albacea las modificaciones y alteraciones resueltas en la presente relación del caso y opinión; disponiendo la Corte que, con arreglo a derecho y justicia, *se adjudique el sobrante que resultare*, en dinero O EN FINCAS, entre las personas con derecho a ello, o sean los cuatro herederos del causante Mario Mercado Montalvo nombrados, Mario Mercado Riera, Margarita Mercado

Riera, Adrián Mercado Riera y María Luisa Mercado Riera . . ."
(T. de A., pág. 93 (Resolución) y pág. 97 (Auto Definitivo)

El interés de los ahora apelantes de aclarar el extremo de la resolución querellada, a que se ha hecho referencia, fué anunciado en anterior recurso a este Alto Tribunal relacionado con este mismo caudal, donde por voz del Hon. Juez Asociado, señor Todd, díjose:

"Si los herederos en el caso de autos *ya habían aceptado la herencia y acordado su adjudicación, de acuerdo con el CONTRATO TRANSACCIONAL* de septiembre 9, de 1938, el hecho de no haber cumplido con sus términos el albacea y el contador partidor no debe prevalecer para sostener, various años después, que los herederos no están de acuerdo en cuanto a la forma en que deben adjudicarse los bienes. Tampoco la apelación pendiente en cuanto a la resolución del Juez Sepúlveda aprobando la cuenta final sometida por el albacea pues, aparentemente, de acuerdo con dicho contrato (inciso (g), dicha cuenta se contraía solamente a 'los frutos, rentas y productos o cualesquiera otras accesiones de los bienes relictos . . . y el saldo que resultare será distribudo por cuartas partes entre los susodichos cuatro herederos del causante.' Decimos 'aparentemente' pues según admiten los peticionarios en su alegato *'el interésde aclarar este extremos constituye, entre otros uno de los motivos de dicha apelación.'* "
Mercado v. Corte, 62 DPR 389-90.

Lo único sometido a la jurisdicción y dictamen del juez inferior, Hon. Domingo Sepúlveda, fué la corrección de la cuenta final rendida por el ex-albacea a marzo 4, 1940, en cuanto a la indebida inclusión u omisión de fondos, gastos y accesiones de los bienes, *y la distribución correspondiente del saldo* que a favor de unos u otros *pudiere resultar* de tal cuenta final. De ella, de las oposiciones a la misma ni de la voluminosa prueba practicada, no resulta *issue* de especie alguna en cuanto a la distribución de *"fincas."*

No podía establecerse tal issue por la circunstancia adicional de que lo impedía pacto solemne entre los interesados mismos.

La disposición *contractual* a virtud de la cual se ha interpuesto este procedimiento especial de cuentas, es clara y explícita. Literalmente copiada, es como sigue:

> (g) *Los frutos, rentas y productos, o cualesquiera otras accesiones de los bienes relictos,* serán objeto de la correspondiente rendición de cuenta final por el albacea a los demás herederos, y el saldo que resultare *será distribuído por cuartas partes entree los susodichos cuatro herederos del causante.*
>
> Si con respecto a cualesquiera partidas o extremos relacionados con dichas *cuentas finales,* que desde luego, comprenderán todas las *trimestrales y que deberán rendirse dentro de los quince días siguientes a este otorgamiento,* surgiere oposición o contienda por parte de cualquier coheredero interesado, de no poderse llegar a un acuerdo amistoso dentro de los cinco días de ser requeridos por uno cualquiera de los firmantes, se someterán las discrepancias o controversias a la autoridad judicial correspondiente."
>
> (Contrato transaccional, cláus. 3ra. subdiv. "g"; Prueba Documental, págs. 28-29).

En este mismo contrato de transacción, los cuatro herederos del causal relicto, se distribuyeron y adjudicaron el interés del causante (10%) en la sociedad Mario Mercado e Hijos (P. Doc. p. 24) asi como todos "los demás bienes de la Sucesión de don Mario Mercado Montalvo," inclusive "*las fincas*" inventariadas, en estos términos:

> "Los demás bienes de la Sucesión de don Mario Mercado Montalvo, según resultaren del susodicho inventario, y los que puedan aparecer después de la pertenecia del causante, se entenderán y quedan adjudicados por partes iguales entre los cuatro herederos don Mario, doña Margarita, don Adrián y doña María Luisa de apellidos Mercado y Riera, tratando los herederos en todo momento de evitar la continuación de la comunidad."

(Contrato Transaccional, cláus. 3ra. parrafo "f"; Prueba Doc. pág. 28; Véase también el inventario de los bienes en Prueba Documental, págs. 701-711.)

Esa adjudicación previa de los bienes por los herederos, quedó reconocida por este Alto Tribunal en el indicado fallo de *Mercado* v. *Corte, 62 DPR. 389-390* (*"los herederos en el caso de autos ya habían aceptado la herencia y acordado su adjudicación,* de acuerdo con el contrato transaccional de septiembre 9 de 1938").

Mal puede disponerse la distribución de *"fincas," que ya los herederos se habían adjudicado por partes iguales.*

El fallo debe entenderse jurisdiccionalmente en relación con la única materia sometida a la consideración y resolución del juez inferior, esto es, la determinación y corrección de la cuenta final a marzo 4, 1940, y la correspondiente distribución por partes del saldo que resultare.

La corte inferior cometió error al ir más allá de la contienda o cuestión ante él planteada conforme al contrato otorgado por los interesados (véase subdivisión "g"):

> "Para dar a *una sentencia* el mérito y finalidad de una adjudicación entre las partes, *debe ser congruente* no solamente con las pruebas, sino *con las cuestiones presentadas en las alegaciones,* porque las alegaciones constituyen la principal base de las sentencias y decretos. *Una sentencia será nula si se aparta de las alegaciones y se basa en un caso que en dichas alegaciones no ha sido alegado, puesto que si se permitiera subsistir sería enteramente arbitraria o injusta, y resolvería una cuestión sobre la cual no fueron oídas las partes.*"
>
> El Pueblo v. P. R. Ry., L. & P. Co., 25 DPR. 409, 435-436, citanda a: 15 R. C. L. 604, párrafo 43.
> Reynolds v. Stockton, 35 L. Ed. 464, 469 col. 1 arriba.

Repetimos que en este procedimiento no se encontraba ni está comprendida la materia sobre adjudicación de "fincas," ni la distribución de los bienes relictos, puesto que los herederos ya se habían adjudicado la propiedad hereditaria, tal como ella resultaba del inventario unido al

contrato transaccional de septiembre 9, 1938 (véase prueba Documental, pp. 701-711), así como cualesquiera otros bienes que pudieran aparecer después de la pertenencia del causante (ante, p. 270):

> "El artículo 191 del Código de Enjuiciamiento Civil no autoriza a las cortes a conceder por sentencia algo que no está comprendido en el asunto objeto del litigio ante ella."
>
> Miranda v. Sucn. López, 58 DPR. 235, 243.
> Capó v. Hartman & Co., 57 DPR. 197, No. 5.

En razón de lo expuesto, se impone la revocación o modificación del fallo en la parte o extremo que dispone la distribución del sobrante "en fincas" ni de bienes que ya los herederos se han adjudicado por cuartas partes en virtud de contrato tranaccional celebrado entre ellos.

(Translation)

IN THE INSTANCE DESCRIBED BELOW, THE COURT WAS IN ERROR INSOFAR AS IT ADJUDICATED THE DISTRIBUTION OF ANY OF THE INHERITANCE WHICH MIGHT BE LEFT IN THE FORM OF "REAL PROPERTIES", BECAUSE, PURSUANT UPON THE AGREEMENT AMONG THE HEIRS, SUCH COURT DECISION SHOULD HAVE BEEN CONFINED TO ADJUDICATING THE DISPOSITION OF FUNDS INCLUDED IN, OR WHICH SHOULD HAVE BEEN INCLUDED IN, THE FINAL ACCOUNTING.

After having satisfied the various criticisms of the final accounting rendered by the ex-executor, the lower court formulated a resolution constituting a final order, to the effect that any of the inheritance which might remain in the form of "real properties", should be divided among those persons entitled to a share in same; the court rendered this verdict without realizing or taking into account the fact that the problem at issue was not that of adjudicating the distribution of "real properties" or immovable goods, and that the settlement-contract drawn up among the heirs contained no reference to or provision for the distribution of real properties.

The relevant portion of the contested resolution, which it is desired to amend and clarify, reads as follows:

> "For the reasons set forth above, in addition to articles 588, 589, and 592 of the Code of Civil Procedure (1933 Ed.), the court is of the opinion that a final order should be entered modifying the final accounts of the executor in conformity with the decisions contained in the present statement of the case and opinion; providing that, according to law and justice, the surplus resulting from said modification of the final accounts, in cash or in real property, be divided among the persons entitled to it, to wit, the four co-heirs of testator Mario Mercado Montalvo, whose names are Mario Mercado Riera, Margarita Mercado Riera, Adrian Mercado

Riera and Maria Luisa Mercado Riera," * * * *. (Transcript, p. 93 (Judgment) and p. 97 (Final Order).)

The desire of the appellants to clarify the latter part of the contested resolution hereinbefore referred to, was stated in a previous appeal to this High Court relating to this same inheritance, wherein the Hon. Associate Judge, Mr. Todd, stated the following:

> "If the heirs in the case at bar had already accepted the inheritance and agreed upon its distribution, pursuant to the compromise contract of September 9, 1938, the fact that the executor and the commissioner of partition had failed to perform its terms should not be ground for claiming, several years afterwards, that the heirs are not in agreement as to the way in which they should distribute the estate among themselves. Nor should the appeal pending regarding the order made by Judge Sepulveda approving the final accounts submitted by the executor be ground either, for, apparently, according to said contract (subdivision (g)), such accounts covered only 'the fruits, rents and products, or any other accretions of the estate . . . and any balance resulting therefrom shall be distributed among the aforesaid four heirs of the ancestor, share and share alike'. We say 'apparently', because as admitted by the petitioners in their brief, 'the concern for clearing up this particular constitutes, among others, one of the grounds of said appeal'." *Mercado* v. *Court*, 62 DPR 389-90.

The only matter submitted to the jurisdiction and opinion of the judge of the lower court, Hon. Domingo Sepúlveda, was the correction of the final accounting rendered by the ex-executor to March 4, 1940, insofar as any unjustified inclusion or omission of funds, expenses and accessions from and of the inheritance were concerned, and *the corresponding distribution of any amounts which might accrue* to one or the other party as a result of such a final accounting. Neither in such a final accounting, nor in any criticisms leveled at same, nor in the voluminous proofs submitted attesting to its accuracy, was any reference whatsoever

made to any issue concerning the distribution of "real properties".

Such an issue could not have arisen for the further reason that the solemn agreement made between the heirs themselves expressly prohibited it.

The *contractual* provision, on the basis of which this petition for a special accounting-procedure was made, is clear and explicit. Literally copied from the original, it reads as follows:

> "*The fruits, income and earnings, or any other accretions to the estate,* shall be the subject of a final account rendered by the executor to the other heirs, and any surplus *shall be distributed in equal parts among aforesaid four heirs of the testator.*
>
> "Should any objection or contention be made by any of the co-heirs with respect to any items in connection with said *final accounts* which, of course, shall include all of the *quarterly accounts which must be rendered within fifteen days following the execution of this document,* the controversies or differences shall be submitted to the corresponding Court" * * *. (Compromise contract, Part Third, subdiv. (g); documentary evidence, pp. 28-29).

In the same compromise contract, the four heirs of the remaining inheritance adjudicated the distribution of the testator's interest (amounting to 10%) in the corporation Mario Mercado e Hijos (Doc. Evidence, p. 24), as well as "all other properties left by Don Mario Mercado Montalvo", including "*real properties*" duly inventoried, in the following terms:

> "The other properties of the Succession of Don Mario Mercado Montalvo, as set forth in said inventory, and all that may be discovered later as belonging to the testator, are hereby adjudicated in equal parts to the four heirs Don Mario, Dona Margarita, Don Adrian and Dona Maria Luisa, of the surnames Mercado y Riera, the heirs to avoid in every way possible a continuation of the community." (Compromise contract,

Part Third, par. (f); doc. ev., p. 28; see also the inventory, doc. ev., p. 701-711).

This previous adjudication of the distribution of the inheritance by the heirs was recognized by this High Court in the above mentioned judgment in *Mercado* v. *Corte,* 62 DPR 389-390 ("the heirs in the case at bar had already accepted the inheritance and agreed upon its distribution, pursuant to the compromise contract of September 9, 1938").

It would indeed be difficult to effectuate the distribution of *"real properties" which the heirs had already agreed to divide equally among themselves.*

The verdict should be legally interpreted and applied only to the particular matter submitted to the consideration and decision of the judge of the lower court—namely, the determination and the correction of the final accounting to March 4, 1940, and the subsequent distribution in shares of any amounts resulting therefrom.

The lower court was in error in exceeding the scope of the matter or problem submitted to its consideration pursuant to the contract drawn up by the heirs (see subdivision "g").

> " 'In order to give a judgment the merit and finality of an adjudication between the parties, it must be responsive not only to the proofs but to the issues tendered by the pleadings, because pleadings are the very foundation of judgments and decrees. A judgment will be void which is a departure from the pleadings, and based upon a case not averred therein, since if allowed to stand it would be altogether arbitrary and unjust and conclude a point upon which the parties had not been heard.' " *People* v. *P. R. Ry. L. & P. Co.* 25 DPR 409, 435-436, citing 15 R.C.L. 604, sec. 43; *Reynolds* v. *Stockton,* 35 L. Ed. 464, 469, col. 1, top.

We repeat that in this proceeding, there was no problem of nor reference to the matter of the distribution of "real properties", nor for the distribution of other properties

inherited, since the heirs had adjudicated among themselves the distribution of the properties inherited, as itemized in the inventory attached to the compromise contract dated September 9, 1938 (see Documentary Evidence, pp. 701-711), as well as any other properties which might accrue to them through ownership by the testator (ante, p. 270).

> "Section 191 of the Code of Civil Procedure does not authorize courts to award in their judgments something which is not included in the object of the suit before them." *Miranda* v. *Lopez*, 58 DPR 235, 243; *Capo* v. *Hartman & Co.*, 57 DPR 197, No. 5.

On the basis of the facts outlined above, it is imperative that the judgment be reversed, or that that portion of the judgment be amended which provides for the distribution of the remaining "real properties" and other goods which the heirs had already divided equally among themselves through a compromise contract drawn up and agreed upon by themselves.